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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 163

JOSEPH MOOK, LEONARD MOOK, SYLVIA MOOK, DAVID MOOK, DANIEL MOOK and JOSEPH MOOK and LEONARD MOOK as Executors of the Estate of Morris Mook, Deceased,

Petitioners,

v.

SAMUEL S. BERGER, SADIE BERGER, HARRY MERDINGER, MILDRED MERDINGER, ARTHUR MERDINGER, HARVEY L. OSTROVER, LILA P. OSTROVER and THE AMERICAN FABRICS COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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INDEX

	PAGE
Opinions Below	2
Jurisdiction	3
Questions Presented	4
Provisions of the Constitution Involved	6
Specification of Time and Manner in Which Federal Questions Were Raised	7
Statement of the Case	8
Guide to Our Presentation	8
The Parties	9
AFC and Its Stockholders	9
The 1948 Stockholders' Agreement	10
The 1953 Stockholders' Agreement	10
The 1953 By-Laws Contract With AFC	10
The Controversy Between the Parties	12
The New York Declaratory Action	13
The Enjoined Connecticut Action	15
The Connecticut Dissolution Action	20
Irrelevancies	20
Reasons and Argument for Allowance of Certiorari	21
I—The contract documents require elucidation, as to AFC's government and regulation of its internal affairs, an elucidation, which can be authoritatively enforced, during AFC's continued existence, only by the Connecticut courts	21
As to Directors' Action Required to be Expressed By a Vote in Excess of a Majority	23
Connecticut's Decisional Law Recognizes that a Connecticut Corporation may, in its By-Laws, Require a Directors' Vote in Excess of a Majority	23

PAGE

Connecticut Statute Law does not Prohibit, but on the Contrary, Affirmatively Authorizes the Adoption of By-Laws which may Require a High Vote for any Effective Action by Directors 25

As to Directors' Action Required to Be Expressed by a Majority of a Quorum, the Quorum Being in Excess of a Majority 26

Connecticut Statute Law, as Amended in 1957, Expressly Authorizes the Adoption of By-Laws Which May Fix a High Quorum of a Corporation's Directors at Any Number Up to and Including Unanimity .. 26

As to Connecticut's Authorization of Either or Both of the Foregoing 26

By so authorizing even a quorum, which requires unanimity, the 1957 Amendment of § 5165 of the Statute Supplemented the High Vote Requirement which had theretofore been recognized as valid in Connecticut's decisional law, and continued so to be 26

The Word "Majority" has a Variable Connotation, i.e., from a Number Constituting more than One-Half of the Membership, to any Number less than Unanimity. Accordingly, Connecticut's 1957 Amendment of § 5165 Declared what had theretofore been Connecticut Law as Formulated in Statute and Decision, though New York's common, and statutory law was formerly to the contrary 29

II—Under the extraordinary principles applicable to a question of public policy inherent in interstate comity concepts—which public policy here concerns itself with the interpretation and construction of Connecticut's statute law as applied to the organic structure of a Connecticut corporation—New York was not entitled to enforce its declaratory judgment in Connecticut, as it did by issuing an injunction, which

PAGE

prevented access to the Connecticut courts, and thus not only to prevent said courts from themselves deciding and enforcing Connecticut's own policy as to what New York had decided, but also from deciding other issues on which New York had not passed 35

III—The injunction granted violates § 1 of Amendment XIV of the Constitution of the United States, in that it abridges the privileges and immunities of the Mooks, as citizens of the United States; deprives them of their property without due process of law, and denies them the equal protection of the law; and also denies to the Mooks, as well as to AFC, the rights guaranteed by the Full Faith and Credit clause of the Constitution of the United States 47

CONCLUSION 49

APPENDIX TO PRECEDING BRIEF

Opinion of Mr. Justice Gavagan at Special Term of the Supreme Court, New York County, in the Action Resulting in the Judgment Sought to Be Reviewed 50

Opinion of Mr. Justice Markowitz at Special Term of the Supreme Court, New York County, in the Action Resulting in the Judgment Sought to Be Reviewed 54

New York Court of Appeals' Reporter's Memorandum of Affirmance of Injunction Judgment Sought to Be Reviewed 56

Excerpts From Decision (Containing Findings) of Mr. Justice Backer at Special Term Relating to Entry of Declaratory Judgment on Respondents' Counterclaim in the Underlying Action 58

PAGE

Excerpts From Judgment of Mr. Justice Backer at Special Term to the Extent That it Renders Declaratory Judgment on Respondents' Counterclaim in the Underlying Action 63

Decision of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, Affirming Judgment Rendered by Mr. Justice Backer at Special Term, in the Underlying Declaratory Judgment Action, and Including the Dissenting Opinion of Mr. Justice Valente 65

New York Court of Appeals' Reporter's Memorandum of Affirmance of the Underlying Declaratory Judgment 67

Excerpts From: Corporation Laws, General Statutes of Connecticut 69

Excerpts From By-Laws of American Fabrics Company as Amended in 1953 71

Excerpts From Answer in the Action for Permanent Injunction, Here Sought to Be Reviewed 72

Excerpts From Pleas in Abatement of the Respondents Herein in the Enjoined Connecticut Action 74

Excerpts From Complaint of the Petitioners in the Connecticut Dissolution Action 76

Excerpts From Answer of the Respondents in the Connecticut Dissolution Action 78

Motion of Respondents in the New York Court of Appeals, Praying That Court to Supplement Its Judgment—Which Motion Was Denied 80

Affidavit of David I. Shivitz in Support of Foregoing Motion 82

Affidavit of Jay Leo Rothschild in Response to Foregoing Motion 85

Remittitur and Judgment of the New York Court of Appeals Sought to Be Reviewed 88

Cases Cited.

Cases:

	PAGE
Alaska Packers Assn. v. Commissioner, 294 U. S. 532, 546	41
Alltmont v. U. S., 177 F. 2d 971; cert. den. 339 U. S. 967	32
Amalgamated Clothing Workers of America v. Richman Brothers, 348 U. S. 511, 514	45
Andrews v. Mines Corporation, 205 Mass. 121, 123, 91 N. E. 122	40
Armour Fertilizer Works v. Sanders, 63 F. 2nd 902, 904 [C.C.A. 5]	48
Arpels v. Arpels, 8 N. Y. 2d 338, 341, 170 N. E. 2d 670	45
Bator v. United Sausage Company, 138 Conn. 18, 81 A. 2d 444	10, 17, 23, 24, 27, 33
Becher v. Contoure Laboratories, 279 U. S. 388, 391	41
Benintendi v. Kenton Hotel, Inc., 294 N. Y. 112	29, 30, 31
Bowen v. Merdinger [196 Misc. 987, 92 N.Y.S. 2d 566; affd. 279 App. Div. 1060, 113 N.Y.S. 2d 282]	20
Brillhart v. Excess Insurance Co., 316 U. S. 491, 497	22, 44
Burford v. Sun Oil Co., 319 U. S. 315, 335	40
Callister v. Graham-Paige Corporation, 146 F. Supp. 399, 403	32
Carpenter v. Strange, 141 U. S. 87	42
Chambers v. Baltimore & O. R. Co., 207 U. S. 142	47
Cole v. Cunningham, 133 U. S. 107, 114	47
Cooke v. Gandry, 309 Ky. 727, 218 S. W. 2nd 960	7
Cowles v. Cowles Realty Co., 201 App. Div. 460, 194 N.Y.S. 546	21
Dr. Hascard v. Dr. Somany, 1 Freeman 503	29
Everett v. Everett, 22 App. Div. 473, 47 N.Y.S. 994	42
Ex Parte Willcock's, 7 Cow. 491	29
Fitzgerald v. Niles Bement Pond Co., 274 App. Div. 499, 84 N.Y.S. 2d 779	41
Gart v. Cole, 166 F. Supp. 129, 132-3	40
Great Lake Dredge & Dock Co. v. Huffman, 319 U. S. 293, 298	44

PAGE

Hartford Life Ins. Co. v. Ibs, 237 U. S. 662, 671 42
Hassel v. Pohle, 214 App. Div. 654, 212 N.Y.S. 561 .. 21
Healey v. R. J. Reynolds Tobacco Co., 48 F. S. 207 [No. Car.] 40

Katcher v. Ohsman, 26 N. J. Super. 28 [1953], 97 A. 2d 180 24
Kent v. Quicksilver Mining Co., 78 N. Y. 159 21

Long Park Inc. v. Trenton New Brunswick, 297 N. Y. 174, 184, 77 N. E. 2d 633 39
Lydia E. Pinkham, etc. v. Gove (298 Mass. 53, 9 N. E. 2d 573) 41
Lyons v. Westinghouse Elec. Corp., 222 F. 2d 184, 189; cert. den. 350 U. S. 825 .....36, 42

Magnolia Petroleum Co. v. Hunt, 320 U. S. 430, 438 .. 41
Manufacturers Record Publishing Co. v. Lauer, 169 F. Supp. 234, 238 [U.S.D.C., La.] 45
Marshall v. Sherman, 148 N. Y. 9, 42 N. E. 419 40
Matter of American Fibre, etc., 241 App. Div. 532, 272 N.Y.S. 206; affd. 265 N. Y. 416, 193 N. E. 253; rearg. den. 266 N. Y. 500, 195 N. E. 171 21
Matter of N. Y. State Labor Relations Bd. v. Holland Laundry, 294 N. Y. 480, 495-6, 63 N. E. 2d 68 37
May v. Anderson, 345 U. S. 528 42
Meredith v. Winter Haven, 320 U. S. 228, 234, 235 .. 36
Messing v. The Barr Corporation, 148 F. Supp. 58 .. 40
Miles v. Illinois Central R. Co., 315 U. S. 698, 704 .. 47
Milliken v. Meyer, 311 U. S. 457, 463 46
Milwaukee County v. White Co., 296 U. S. 268, 273 .. 42

Nashua & Lowell R. Corp. v. Boston & Lowell R. Corp., 136 U. S. 356, 370 47
New Haven v. Derby R.R. Co., 38 Conn. 56 28
Niagara Falls Internatl. Bridge Company v. Grand Trunk Ry. Co., 241 N. Y. 85, 93, 148 N. E. 797 .. 39

Oklahoma Packing Co. v. Oklahoma Gas & Elect. Co., 309 U. S. 4, 9 45

Pennsylvania v. Williams, 294 U. S. 176, 185 .....39, 44
Perutz v. Bohemian Discount Bank, 304 N. Y. 533, 110 N. E. 2d 6 36

PAGE

Pink v. A.A.A. Highway, etc., 314 U. S. 201, 210-211 41
Public Service Commission of Utah v. Wycoff Co., 344 U. S. 237 ..... 40, 43

Railroad Comm'n v. Pullman Co., 312 U. S. 496, 501 .. 40, 43
Reilly v. Steinhart, 217 N. Y. 549 36
Rodgers v. Insurance Co., 148 N. Y. 34, 39, 42 N. E. 515 42
Rogers v. Guaranty Trust Co. of N. Y., 288 U. S. 123 ..... 36, 42
Rohlsen v. Latin American Airways, 65 N.Y.S. 2d 644 40
Roland Park, etc. v. Hendler, 206 Md. 10, 109 A. 2d 753 31
Rubin v. Irving Trust Co., 305 N. Y. 288, 113 N. E. 2d 424 36

Sauerbrunn v. Hartford Life Ins. Co., 220 N. Y. 363, 371-2, 115 N. E. 1001 40
Simms v. Garrett, 114 W. Va. 19, 170 S. E. 423 41
Spector Motor Service v. Walsh, 323 U. S. 101, 104 .. 42
Spilker v. Hankin, 188 F. 2d 35, 39—C. A., D. C. 36
St. John v. Wisconsin Employment Relations Board, 340 U. S. 411, 414 7
State v. Tudor, 5 Day 329, 5 Am. Dec. 162 23

Town of Solon v. Williamsburgh Savings Bank, 114 N. Y. 122, 21 N. E. 168 32
Travis v. Knox Terpezone Co., 215 N. Y. 259, 263, 109 N. E. 250 39

Union Pacific R.R. Co. v. Weld County, 247 U. S. 282, 287 42
U. S. v. Silliman, 167 F. 2nd [CA 3] 607; cert. den. 335 U. S. 825 40

Van Denburgh v. Tungsten Reef Mines Co., 48 Ariz. 540, 63 P. 2d 647 41
Vanderveer v. Erie Malleable Iron Company, 238 F. 2nd [CA 3] 510; cert. den. 353 U. S. 937 40

Weiss v. Routh, 149 F. 2d 193 [CA 2] 39
Westchester Mortgage Co. v. Grand Rapids, etc., R. R. Co., 246 N. Y. 194, 158 N. E. 70 ..... 37, 44
Wichita Royalty Co. v. City Bank, 306 U. S. 103, 109 42
Williams v. Green Bay & W. R. Co., 326 U. S. 549 .. 36

Statutes Cited

	PAGE
Constitution of the United States:	
Section one of Article IV (U.S.C., Vol. 1, 1958 Ed., Const. Art. IV, p. XLV)	7
Article V of the Amendments to the Constitution (U.S.C., Vol. 1, 1958 Ed., Const. Am., Art V, p. XLVI)	6
Section one of Article XIV of the Amendments to the Constitution (U.S.C., Vol. 1, 1958 Ed., Const. Am., Art. XIV, p. XLVII)	6, 47
Connecticut Corporation Laws:	
Section 2570d	25, 27
Section 5157	25, 27
Section 2574d	25, 34
Section 5165	26, 27, 29, 32, 34
Section 5126	28
Section 5219	34
Section 5234	34
Section 5248	34
Connecticut's Stock Corporation Act, in force, since January 1, 1961:	
Section 33-316	30 (footnote)
Section 33-418	30 (footnote)

Miscellaneous

Restatement, Judgments, § 77, Comment b, p. 344	7
10 ALR 2nd 787	7
Fletcher, Cyclopedia of Corporations (Vol. 8, p. 813, § 4210)	24, 25
O'Neal—Close Corporations (1958), Vol. 1, § 4.22, p. 209	28
62 Harvard Law Review 526	31
15 Brooklyn Law Review 150	31
Leg. Doc. (1957) No. 17 being "Interim Report to 1957 Session of New York State Legislature"	31
22 Washington University Law Quarterly 305, pp. 338-339	31
33 New York University Law Review 700	31
58 Yale Law Journal 795	31
Webster: International Dictionary	32
Funk & Wagnall's New Standard Dictionary	32
Robert's "Rules of Order" (75th Anniv. ed.) pp. 24, 202, 260	32
Halsbury's "Laws of England" (2d ed.) (Vol. 8) p. 54	32

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK*

TO THE HONORABLE THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners pray that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York, rendered by said Court on March 30, 1961 and entered in the office of the Clerk of the County of New York, State of New York, on April 10, 1961, which judgment affirmed judgments below restraining petitioners from prosecuting an action in Connecticut's Superior Court involving the government and regulation, under its by-laws, of a Connecticut corporation, i.e., as to whether corporate by-laws, whether construed as requiring that directors' actions be expressed by more than a majority vote of the directors, or by a quorum of more than a majority, was in either aspect, valid under Connecticut law.

We believe that the federal issues here presented are of first impression (*infra*, pp. 4-6).

* References to the Certified Record are (1) to the three constituents thereof, i.e., Buff, Gray and Blue (see explanation, *infra*, p. 8); and (2) to the specific folio. All italics, unless otherwise indicated, are supplied.

Opinions Below

[In accordance with Rules 23(i) and (j) of the Revised Rules of this Court, the opinions of the courts below and in the underlying litigation to which reference is necessary to ascertain the grounds of the judgment sought to be reviewed are annexed hereto (*infra*, pp. 50-68); and also the said judgment (*infra*, p. 88).]

The opinion of Special Term, New York County Supreme Court, granting a temporary injunction (*infra*, p. 50) is reported in 16 Misc. 2d 1022, 184 N.Y.S. 2d 911. The affirmance thereof by the New York Appellate Division, First Department, without opinion, is reported in 8 A. D. 2d 793 [case 7], 188 N.Y.S. 2d 948. A motion for leave to appeal to the Court of Appeals was denied by said Appellate Division, without opinion, and is reported in 9 A. D. 2d 616 [case 8], 191 N.Y.S. 2d 356. The opinion of Special Term, New York County Supreme Court, granting summary judgment and a permanent injunction (*infra*, p. 54) is reported in 25 Misc. 2d 39, 195 N.Y.S. 2d 967. The affirmance thereof by said Appellate Division, without opinion, is reported in 10 A. D. 2d 917 [case 17], 202 N.Y.S. 2d 203. A motion for leave to appeal to the Court of Appeals was granted by the New York Court of Appeals, without opinion, and is reported in 8 N. Y. 2nd 708. The affirmance by the New York Court of Appeals, without opinion, is reported in 9 N. Y. 2nd 805 (copy of the reporter's memorandum, *infra*, p. 56).

Underlying the judgment of injunction, sought to be reviewed, is an action in the New York Supreme Court, prosecuted by the Petitioners herein (as plaintiffs) against the Respondents herein (as defendants), which, on a counterclaim therein interposed by Respondents (there defendants) resulted in a judgment declaring that the Connecticut corporation's stockholders' agreement and the corporation's by-laws were invalid insofar as they required that the corporation's Board of Directors could act only by an affirmative vote of six of its seven directors. It was by reason of said declaratory judgment, and to prevent the

Connecticut courts from independently expressing their State's own public policy with respect to the subject thereof, that the judgment of injunction herein sought to be reviewed, was rendered. We shall hereinafter refer to the said declaratory judgment action as the "underlying action".

In said underlying action, there was no opinion by the trial court. We therefore annex to this petition a copy of the decision of the trial judge (containing his findings) and his judgment, to the extent that they relate to the declaratory judgment—all part of the certified record filed herein—[Buff 67 ff., *infra*, pp. 58-64] from which findings the nature and scope of said declaratory determination adequately appear. The New York Appellate Division for the First Department affirmed without any majority opinion, but there was a dissenting opinion by Mr. Justice Valente of that court, as to the declaratory judgment (*infra*, p. 65), which opinion is reported in 7 A. D. 2nd 726 (Case 1), 180 N.Y.S. 2nd 400. A motion for reargument, denied by said Appellate Division, without opinion, is reported in 7 A. D. 2nd 837 (Case 11), 182 N.Y.S. 2nd 295. The New York Court of Appeals' affirmance of the declaratory judgment, without opinion, (which alone was the subject of appeal by petitioners to that court), is reported in 6 N. Y. 2nd 833, 188 N.Y.S. 2nd 219; *infra*, page 67.

Jurisdiction

The judgment sought to be reviewed (*infra*, p. 88) was rendered by the New York Court of Appeals on March 30, 1961. On April 10, 1960, said judgment was made the order of the New York Supreme Court by its order, entered in the office of the Clerk of the County of New York, State of New York.

No application or order for rehearing was made, except that, on May 29, 1961, returnable June 5, 1961, Respondents moved in the New York Court of Appeals, in effect praying that said court write an opinion to the effect that not only had it held that a requirement that the Connecticut corporation's Board of Directors might act

only by a majority of six of its seven members, was invalid, but that it had also held against Petitioners' contention that the Connecticut corporation's by-laws required a directors' *quorum* of six. The motion was denied on June 9, 1961 (certified supplement to the Certified Record filed herein; *infra*, pp. 80-7). In any event, whatever the New York Court of Appeals decided on that issue is here irrelevant, because the federal question (*infra*, pp. 4-6) which we argue, is, among others, whether it was not Connecticut's exclusive prerogative to declare its own public policy with respect to the internal government of its own corporation. *A fortiori*, as appears to be the case, since the New York courts did not decide the quorum issue at all!

There is no order granting an extension of time within which to petition for a writ of certiorari.

The jurisdiction of this Court is invoked under 28 U.S.C., § 1257(3).

Petitioners assert violation of Articles V, and of Section I of Article XIV of the Amendments of the Constitution of the United States, and of Section one of Article IV of the Constitution of the United States (Answer, Gray, 66-71; *infra*, pp. 72-4).

Questions Presented

The questions presented and upon which the judgment sought to be reviewed is necessarily predicated are:

1. Under applicable provisions of the Constitution of the United States, may the courts of the State of New York enjoin residents of New York, who are the sole stockholders of a Connecticut corporation, from prosecuting an action in the courts of the State of Connecticut, to which the Connecticut corporation is a party, the outcome of which litigation will depend on and require adjudication, under Connecticut law, of provisions in said Connecticut corporation's by-laws, for a high vote or high quorum (in each case, in excess of a bare majority), for any effective action by the corporation's Board of Directors in governing and regulating the internal affairs of said corporation?

2. Is it a justification for such an injunction, that, in a prior action brought by Petitioners in New York (the Connecticut corporation not having been a party to said prior action), the New York courts—exercising jurisdiction without objection thereto by any of the parties to said litigation—(1) dismissed Petitioners' prayer for *consequential* relief, by way of an injunction, to restrain their director-co-stockholders, from refusing—in violation of the stockholders' agreement and of the Connecticut corporation's said by-laws—to vote for one of Petitioners (Leonard Mook) as a director and as counsel to the corporation, and (2) on a counterclaim interposed by respondents in said action (here, together with the Connecticut corporation, which was not a party to the prior action, plaintiffs in the injunction action sought to be reviewed) rendered a declaratory judgment, *without the grant of any consequential relief*, incidental to the dismissal of Petitioners' said complaint, or to said declaratory judgment, which abstractly declared that under Connecticut's presumed common law, a Board of Directors of a Connecticut Corporation could not, by its by-laws, be required to express its will by any number of its members more than a bare majority?

3. Did it not remain Connecticut's sole and exclusive prerogative for itself to decide:

a.) Whether it would follow and enforce the New York declaratory judgment thus abstractly declaring New York's view of Connecticut's presumed common law in the premises;

b.) Whether it would independently reach a different conclusion, in this aspect, as to its common law, or conclude that it was Connecticut's corporate *statutory* law—which New York was bound to respect—which afforded the applicable and appropriate standard for the continued and future government of its own corporation, both as to the issue as to the number of the members of the Connecticut corporations' Board of Directors required to express its will (which the New York Court of Appeals had decided in the underlying action); and as to the quorum

issue which it had not decided, and which petitioners sought, by their enjoined Connecticut action, to have the Connecticut Courts decide.

c.) Whether, by reason of the injunction sought to be reviewed, enforcing the underlying declaratory judgment, the Connecticut corporation could permanently escape government and regulation by its domiciliary law as interpreted by the Connecticut Courts?

A fortiori, as to each and all of these questions, in view of Connecticut's declaration, by statute now effective, of the principles for which we have always contended (*infra*, p. 30)!

In effect, Petitioners pray this Court to permit them—in vindication of their constitutional rights—as this Court would in the exercise of its discretionary policy, in review of similar issues arising in the lower federal courts—to ascertain from Connecticut's courts what they, and not New York, may promulgate as Connecticut's public policy, applicable to the life of AFC.

Provisions of the Constitution Involved

The following provisions of the Constitution of the United States are involved:

1. Article V of the Amendments to the Constitution (U.S.C., Vol. 1, 1958 Ed., Const. Am., Art. V, p. XLVI):

> "No person shall be • • • deprived of life, liberty, or property, without due process of law; • • •."

2. Section one of Article XIV of the Amendments to the Constitution (U.S.C., Vol. 1, 1958 Ed., Const. Am., Art. XIV, p. XLVII):

> "Section 1. • • • No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[These provisions touch the right of Petitioners—all New York citizens—to sue in Connecticut.]

3. Section one of Article IV (U.S.C., Vol. 1, 1958 Ed., Const. Art. IV, p. XLV):

"Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. * * *"

[This, as to the right of Petitioners to have New York respect Connecticut's statutory law.]

Specification of Time and Manner in Which Federal Questions Were Raised

The federal questions here sought to be reviewed were raised by the Petitioners (defendants in the injunction action) in their Answer to the Complaint, as First and Second Complete Defenses to the cause of action set forth in the Complaint (Gray, 66-71; *infra*, pp. 72-4). Said pleadings showing, in each instance, the infringement as to which grievance was alleged, were before each court below, and the federal questions were briefed and argued by counsel. In granting the injunctive relief prayed for by plaintiffs (Respondents to this petition), the courts below necessarily decided said issues, adversely to the Petitioners herein (cf. *infra*, pp. 85-7 and the New York Court of Appeals' Reporter's memorandum (9 N. Y. 2d 805; *infra*, p. 361).

To support this petition, Petitioners rely solely on such federal questions. Accordingly, for the purposes of this petition (though, as to the non-federal issues,* not here argued, we contended in New York, and shall, in Connecticut, continue to contend to the contrary), it is immaterial whether or not, for New York, the underlying

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* So, for example, it is settled that a declaratory judgment, different from ordinary judgments, concludes the parties only as to what is explicitly declared in said judgment. It does not preclude what might have been, but was not litigated. (Restatement, Judgments, § 77, Comment b, p. 344, 10 ALR 2nd 787, § 3; *Cooke* v. *Gandry*, 309 Ky. 727, 218 S. W. 2nd 960; *St. John* v. *Wisconsin Employment Relations Board*, 340 U. S. 411, 414.) Accordingly, the *quorum* issue, never litigated in New York, and not even mentioned in the underlying action's judgment, could not possibly be *res judicata*, in any sense! But that conventional issue is not here! Only whether it should have been decided—and by the Connecticut courts!

judgment, whatever its scope, could or would not in an action awarding consequential relief be deemed *res judicata* of the issues presented in the enjoined Connecticut action. The federal issues are as to whether it is New York or Connecticut which, under the Constitution, has the exclusive prerogative, vis-a-vis the corporation itself, to govern and regulate it, and to make appropriate declarations as to the future conduct of its internal affairs, apart from and without the award of any consequential relief; and whether Petitioners—because they are New York citizens—may be restrained from invoking the processes of the Connecticut Courts to ascertain Connecticut's present and future public policy. *A fortiori,* bearing in mind that the Connecticut corporation was not a party to, but the victim of the New York action to which only its stockholders were parties, resulting in the underlying declaratory judgment!

Statement of the Case

Guide to Our Presentation

Exposition of the material facts requires analyses of litigations in New York and Connecticut, which constitute its setting, and consequent identification of and reference to the several records on appeal which reflect those litigations, and which, in the New York courts, were incorporated in the record of the judgment, which is the subject of this petition (Blue, 295), and are, therefore, integrated in the certified record filed in this Court. To facilitate reference to the certified record, we shall identify each of said constituents of the entire Record by the color of that constituent's cover page, tagged in the corresponding color:

1. The underlying New York declaratory judgment action, resulting in the granting of a declaratory judgment in favor of the Berger-Merdingers: *Buff*

2. The preliminary injunction record: *Gray*

3. The permanent injunction record, incorporating all of the above (Blue, 295-300): *Blue*

4. The papers on Respondents' motion in the Court of Appeals, for a "supplement"—which motion was denied: *White*

The applicable Connecticut statutes, the material parts of which are set out in the Appendix hereto (*infra*, pp. 69-71) appear in Exhibit A (green pamphlet) admitted in the underlying action (Buff, 205). It should be noted that Connecticut's retroactive corporation laws, in force since January 1, 1961, clearly validate the by-laws, which the injunction judgment under review assumed to be invalid, and which by-laws, we assert, were always valid (See footnote, *infra*, p. 30).

The Parties

The parties to this controversy became plaintiffs or defendants, as one group or the other took the offensive in successive New York and Connecticut litigations. Therefore, it will avoid confusion to refer to the parties as follows:

1. To the Plaintiffs-stockholders, i.e., the Bergers, Merdingers and Ostrovers, (Respondents herein) as "the Berger-Merdingers";

2. To the Defendants-stockholders, (Petitioners herein) as "the Mooks";

3. To the Connecticut corporation, The American Fabrics Company, as "AFC".

AFC and Its Stockholders

AFC is a "closed" Connecticut corporation, organized in 1919 (Charter at Buff, 383). The Mooks and the Berger-Merdingers together are its sole stockholders. The Mooks own 49.78% and the Berger-Merdingers 50.22% of AFC's stock. All of the stockholders are residents of the State of New York. AFC has its principal plant at Bridgeport, Connecticut, and other plants in Rhode Island and New Jersey, and sales offices in New York City. The corporation is licensed to and does business in New York. The Mooks invested in excess of $300,000 in AFC, including loans to AFC now subordinated to AFC's other financial commitments (Gray, 173).

AFC is a company of magnitude. As at September 30, 1958, its consolidated net worth was $2,365,128, and it pays executives' salaries to the individuals here involved, or some of them, of about $100,000 annually (Gray, 174).

The 1948 Stockholders' Agreement

The relationship between the parties began in 1948, when Morris Mook (now deceased) and Joseph Mook and the Berger-Merdingers, entered into a stockholders' agreement. As stated in the 1948 agreement, its purpose was to "assure to the Company capable management and continuity in the business policies of the Company and to protect the value of the enterprise * * * and to protect their [i.e., all the stockholders'] own individual interests in so far as the same is possible" (Buff, 237). The charter, being silent on the subject (Buff, 385), it was provided that there should be a board of six directors, and that the concurrence of five should be required "to the extent permitted under applicable law" (Buff, 242). However, though the AFC by-laws were amended, in 1948, and members of the Berger group, of the Merdinger group and of the Mook group, were elected to the Board of Directors (Buff, 278), there was then no implementation, in the corporate by-laws, of the agreement provision for concurrence of five.

The 1953 Stockholders' Agreement

In 1953, all of the parties to the present litigation entered into a new stockholders' agreement, to continue until 1963 (Buff, Ex. 2, 274). This agreement incorporated much of the 1948 stockholders' agreement (Buff, 335-6) and provided that the Board of Directors should be increased to seven, of which number the concurrence of six would be required to effectuate corporate action. The precautionary phrase in the 1948 agreement (Buff, 235, 242) "to the extent permitted under applicable law", was omitted (Buff, 323)—undoubtedly because of the intervening Connecticut decision, in *Bator* v. *United Sausage Co.* (138 Conn. 18, 81 A. 2d 444; *infra*, pp. 23-5), which appeared to eliminate any doubt, which might theretofore have existed that applicable Connecticut law so permitted stockholders to agree.

The 1953 By-Laws Contract With AFC

On the very same date, and as part of the same transaction in which the stockholders' agreement of July 9,

1953 was made, a special meeting of AFC's stockholders adopted said agreement, and enacted amendments of the by-laws, in conformity with the 1953 agreement, which by-laws, of course, constituted a contract between the corporation and its stockholders (Authorities, *infra*, p. 21; Compl., par. 6 [Gray, 32]). This "directors" by-laws amendment was at large, and over-all, and without allocation to any specific by-law. It was prefixed to the very beginning of Article 3, concerning itself with directors (Buff, 356). The actual corporate record (copy of which, as exhibited to the New York Court of Appeals, we shall hand up) shows the amendment affixed as a rider or endorsement, stapled on the lefthand margin of the second page of Exhibit 4 and overlapping the text (Buff, 356, containing the by-laws). Its purpose, thus to effect each and every section of the "directors" article of the by-laws, including the quorum provision (Section 4(c)) is indisputable. The "directors" portion of the by-laws amendment was as follows:

> "That the board of directors of the company shall consist of *seven* members, and that no action by the *board* may be effectively taken except upon the affirmative vote of six of the *company's* members." (Buff, 356)

The amendment stipulating as to how the by-laws might be amended, was as follows:

> "* * * that no amendments to such by-laws may be made in the future except upon the affirmative vote of at least 80% of the company's outstanding voting stock." (Buff, 378)

In fact, at AFC's stockholders' meeting, the two overall amendments to the by-laws were incorporated in one and the same pronouncement, so that they were actually integrated as one—a fact, which is highly significant, because it shows that no matter what happened, there was not to be any change in the government of the corporation, except on the consent of at least 80% of the stockholders, i.e., in no event, without the consent of Petitioners:

> "That the board of directors of the company shall consist of seven members, and that no action by the board

may be effectively taken except upon the affirmative vote of six of the company's members, and that no amendments to such bylaws may be made in the future except upon the affirmative vote of at least 80% of the company's outstanding voting stock." (Gray, 266)

The corporation evidenced its integrated by-laws contract with its stockholders by having an endorsement made on the stock certificates that the certificates were issued "subject to the terms and conditions of stockholders' agreement dated and executed by all holders of the outstanding stock, on July 9, 1953" (Gray, 269).

Whether said amendment thus stipulated (1) only the vote by which a quorum might act, or (2) the number which would constitute the quorum itself, or (3) both, was thus left in ambiguity. For at least six of the Board's members were stockholders, so that reference to "members" of the "company" included both the Board member and stockholder concepts. Therefore, whatever the mechanics, the intention of the parties is clear. Obviously there could not be a vote of at least six unless there was at least a quorum of six—which high quorum, since 1957, has been authorized by Connecticut law (Ex. A, supplement, § 5165; *infra*, pp. 70-1). And Respondents' own motion to the Court of Appeals, which was denied, makes it clear, that the Court of Appeals did not even for itself, decide anything except as to item (1) *supra*, p. 11 (Supplement to Certified Record, *infra*, pp. 80-7).

And, in addition it was clear that there could not be any change in the by-laws without consent of 80% of the stockholders.

The Controversy Between the Parties

In this setting, in the period from 1949 to 1958, Leonard Mook was one of the Mook group's designees as director of AFC, and served as such, and was also general counsel to the corporation (Buff, 71).

In 1955, a controversy arose between the Berger-Merdinger stockholders and the Mook stockholders, revolving about the conduct of Leonard Mook in executing

an agency transaction, but it was not until 1958 that the Berger-Merdinger stockholders gave notice that, at the next annual meeting of stockholders, they would not vote to re-elect Leonard Mook as a director, and that they would oust him as counsel (cf. Compl., pars. 12-13 [Buff, 29-30] with the exposition in Mook's affidavit [Gray, 147-152]).

The New York Declaratory Action

Personal service of all the parties to the stockholders' agreement not being feasible in Connecticut (the Berger-Merdingers all being New York residents and citizens), and it being believed that personal service was indispensable, an action was commenced in the New York Supreme Court by the Mooks against the Berger-Merdingers, to restrain them from refusing to vote for Leonard Mook as a director, and from voting (in the absence of concurrence by the Mooks) to discharge him as AFC's counsel. AFC was not made a party to the action. The action was predicated, not on the aforesaid by-laws as a contract, but on the stockholders' agreement as carried forward into, and, thus, supplemented by AFC's by-laws. The only claim made was that AFC's Board of Directors could not express its will except by an affirmative vote of six of its seven members. The Berger-Merdingers interposed, as a complete defense, in said New York action, that Leonard Mook had allegedly violated his fiduciary obligations to AFC, and, as a partial defense, and as a counterclaim, that, under the common law of Connecticut, any requirement that a Board of Directors express its will by any number of its members greater than a bare majority, was invalid (Buff, 44-7, 49, 56-9)—a subject-matter as to which, had there been timely objection, New York would undoubtedly not have assumed jurisdiction (see authorities in dissenting opinion of Valente, J., printed, *infra*, p. 65). But no objection was made by the Mooks' former counsel, or, for that matter, by the Berger-Merdingers' counsel, either, with the result that the Berger-Merdingers contended that though it was only on the Berger-Merdingers'

counterclaim that a declaratory judgment—projecting its effect onward, was rendered, (the partial defense having operated to supplement the reasons for dismissing the Mooks' Complaint [Buff, 48])—it was the Mooks—not the Berger-Merdingers—who by asking for consequential relief by way of an injunction, invoked the jurisdiction of the New York courts and, therefore, could not be heard to complain that on the Berger-Merdingers' counterclaim, the New York Court rendered an abstract declaratory counterclaim as well.

Moreover, on the trial—because their former counsel had mistakenly advised them that whatever the accusation of wrongdoing, the Berger-Merdingers were, as a matter of law, required to vote for Leonard Mook as a director (Blue, 276-7)—the Mooks, instead of litigating the issue of fact tendered as to Leonard Mook's loyalty, in a misguided zeal to avoid a long trial, invited decision of what they mistakenly supposed was a mere hypothetical question of law, and, therefore, conceded, "for the purposes of this case only" (Buff, 195), that Leonard Mook had broken an implied condition of loyalty commanded by his contract of employment (Buff, 86-90). Moreover, and to facilitate such decision of what they had been mistakenly advised was a question of law on which they must prevail, the Mooks even waived Berger-Merdingers' laches over a period of three years, in interposing a claim of misfeasance on Leonard Mook's part.

It should be noted, however, that neither the New York declaratory judgment, nor the findings, underlying it, embodied any determination as to whether the by-laws should be construed to require a *quorum* of at least six. Indeed, no such issue was even litigated, in that action. The record does not permit of a doubt on that score. And the New York Court of Appeals' denial of Respondents' motion to have it certify otherwise (Supplement, certified record; *infra*, pp. 80-7) confirms what is, thus, independently clear. All that Special Term decided in the underlying declaratory judgment was that

the applicable law, on the issue as to whether a Board of Directors could be limited to an expression of its will by a vote in excess of a bare majority vote, was Connecticut's *presumed common law* on that subject, which—in the absence of any authoritative proof as to what was Connecticut's common law—was held to be the same as New York common law, and that, therefore,

> "• • • under the common law of both such States the vote of a majority of a quorum of a corporation's Board of Directors, duly convened, is sufficient for action to be effectively taken by such Board." (Findings 25-28, Buff. fols. 94-8, 61-107, particularly 91-8)

[As we shall show, Connecticut's statutory law eliminated the propriety of any inquiry as to what was or was not its presumed common law (*infra*, pp. 25-34, 70-1).]

On appeal to the New York Appellate Division (on which appeal, the undersigned was first substituted as counsel for the Mooks—other than Leonard Mook), the judgment of Special Term was affirmed, by a divided vote. The majority did not write an opinion. Valente, J., dissented, in a memorandum as to the declaratory-judgment counterclaim (Buff, 449-53).

On appeal to the New York Court of Appeals (on which appeal, the undersigned counsel was substituted, and acted for Leonard Mook also)—which appeal was taken only from that part of the judgment rendered on the counterclaim for declaratory judgment, above described (Buff, 427-31)—the New York Court of Appeals unanimously affirmed. Accordingly, no issue as to Petitioners' Complaint in the underlying action, or as to Leonard Mook, was presented to the New York Court of Appeals, and, accordingly, no such issue is here, either.

The Enjoined Connecticut Action

While the case was *sub judice* in the Appellate Division and under guidance of present counsel, who had been substituted, the Mooks commenced the enjoined action in the Superior Court of Connecticut, in which they sought an injunction and damages, not merely with respect to the subject-matter of the New York action just described—i.e.,

to enforce a requirement that AFC's Board of Directors might not act except on an affirmative vote of at least six out of seven of its directors—but to establish that AFC's by-laws prescribed a *quorum* of at least six directors out of seven, and to stop what was in effect, a judicial amendment of AFC's by-laws so that not 80% of AFC's stockholders, as required by said by-laws, but a fraction of one per cent over a bare majority, would govern the corporation. It was, therefore, that not only all stockholders—as in the New York action—but also the corporation, AFC (which had not been a party to that action) were, in Connecticut, joined as parties (Gray, 196-234).

Thus, in the Connecticut Superior Court action in which the Mooks, for the first time, joined the corporation (AFC) as a party defendant, the Mooks sought:

(1) *In the First Count:* To obtain a declaration that, under the Connecticut law and AFC's by-laws, a quorum of the corporation's directors consisted of a number not less than six. The issue in said Connecticut action was not—as it was in the New York action—as to whether six out of seven directors must vote in the affirmative to effectuate Corporate action, but as to whether a quorum of at least six was required to express the will of the Board of Directors (Gray, 206).

(2) *In the Second and Third Counts:* It was alleged that AFC was "a party to" the stockholders' agreement, and that said corporation had broken its agreement with its stockholders by permitting action by a number of directors less than four *constituting a majority of a quorum of six* (Gray, 208-212). It will be observed that no such issue was raised, considered or decided in the New York action.

Accordingly, in the Connecticut action, an injunction was asked "against the Defendant Company" [AFC] as well as the others, and specific performance of its agreement, as against said "Company" as well as the others; furthermore, restraining defendants therein from violating the stockholders' *and by-law agreement*—to which it was alleged that the individual stockholders and the corporation were, respectively parties (Gray, 212-213).

It will be noted, therefore, that the Connecticut action, different from the New York action, and in addition thereto:

(1) counted on the contract with the corporation [see particularly pars. 5, 6, and 7 of Connecticut complaint (Gray, 209; also Gray, 196, 200, 207, 212, 213)].

(2) did not limit itself merely to a declaration of rights but

(3) sought consequential relief by way of injunction against unwarranted acts, including usurpation of control of AFC, and

(4) sought enforcement of the purport and effect of the by-law amendment, not merely as to whether more than a bare majority of its members was required to express its will, but also as to whether it contemplated a high quorum, or both; and

(5) sought damages against defendants, including the corporation, for breach of the stockholders' agreement, to secure which damages an attachment was issued and a levy was made [cf. the Connecticut *Bator* case (*infra*, pp. 23-5) which certainly authorizes such a claim for damages].

Moreover, the Connecticut action—since it sought definition and enforcement of Connecticut's corporation statutes, as to one of its own corporations—was by its nature *in rem* (see discussion, *infra*, pp. 39, 42); and, by reason of the attachment made on the assets of some of the individuals, incident to the claim for damages, as to the levy thus made, was also *in rem*.

To the complaint in said Connecticut action, the Berger-Merdinger stockholders (defendants in said Connecticut action) pleaded, among other things, that the prior New York declaratory judgment was *res judicata* (Gray, 246). This plea of *res judicata* rested upon the assumptions (1) that the causes of action were "substantially similar" (Gray, 245)—it was not said or claimed that the causes of action were the same; and (2) that AFC—whose agree-

ment and by-laws were the subject of the action, and which had not been a party to the underlying New York action,—was, in the Connecticut action, only a "nominal" defendant (Gray, 248).

Thereupon, as the Connecticut trial judge held was contemplated by Connecticut practice, a preliminary trial of the *res judicata* issue was had (Gray, 279).

But, before the issue could be determined, the Berger-Merdingers procured a New York preliminary injunction from Mr. Justice Gavagan, at Special Term, New York County, in the injunction action, which is the subject of this petition (Gray, 292-306, *infra*, pp. 50-3). This, upon the ground that the New York judgment had "substantial similarities", if it was not *res judicata*, and that it would be burdensome for the Berger-Merdingers to try what they said was the same controversy, in Connecticut, though it was there that AFC had its principal place of business (Gray, 300).

In this injunction action, the Mooks interposed an answer, pleading the federal issues upon which we rely (*supra*, pp. 72-4).

The aforesaid preliminary injunction, was affirmed by the New York Appellate Division (8 A. D. 2d 793 [case 7], 188 N.Y.S. 2d 948), and then made permanent (25 Misc. 2d 39, 195 N.Y.S. 2d 967; Blue, 13), and on appeal to the New York Court of Appeals, affirmed.

The Special Term opinion of Mr. Justice Markowitz, rendered on final judgment, well demonstrates the fallacious reasoning, which thus led to the denial of Petitioners' rights.

In the first place, its observation that the underlying action was tried "upon the identical issues" raised in the enjoined Connecticut Superior Court action, and there "fully litigated" is erroneous. The *quorum* issue was never at all litigated or determined in New York (cf. opinion, *infra*, pp. 53-5 with pleadings, findings and judgment, in the underlying action [*Buff*, 19-120; *infra*, pp. 58-64]; cf. also the New York Court of Appeals Re-

port of the underlying action, *infra*, p. 67). But more important to the federal issues upon which we rest this petition, is the following observation made by the court:

> "The effect of the New York judgment may be inquired into in the dissolution action, but to inquire again into the legal effect of the agreement and by-laws in the circumstances here is vexatious. It is suggested that a Connecticut corporation cannot operate contrary to Connecticut public policy, but this is to suggest that the courts of this State, in passing upon the questions raised here, were in some way incapable of doing so." (Blue [294, *infra*, p. 56])

If, because it was Connecticut, which gave life to its corporation, it is only Connecticut, which can take away that life, then by what standard may New York presume to govern that life, while it continues? Obviously, the New York courts confused New York's undoubted prerogative, where it had jurisdiction of the persons, to grant *consequential* relief, in a particular litigation, with the absence of any such right to regulate, by declaration, as to the Connecticut corporation's internal government *now, and in futuro!*

Thus, in effect, though the underlying New York declaratory judgment had torn asunder what was one integrated amendment of AFC's by-laws, upon the invocation of 50.22 percent of AFC's stockholders, notwithstanding that it was specified both in AFC's by-laws (Buff, 378) and in the stockholders' agreement between the parties, that there must be concurrence by at least 80% of AFC's stockholders, the Mooks, by the injunction against the enjoined Connecticut action, were prevented not only from asking enforcement of AFC's by-laws, touching its government and regulation, but even were prevented from asking the Connecticut Court to rule that excision of an undoubtedly valid part of the stockholders' agreement and by-laws, i.e., that the by-laws could not be amended by judicial surgery or otherwise, by a vote of less than 80 percent of AFC's stockholders, could not thus be accomplished. The result was and is that the Berger-Merdingers are in exclusive control of AFC.

The Connecticut Dissolution Action

Thereafter, because they were deprived of any other remedy, the Mooks commenced another action, in Connecticut, for dissolution of AFC, predicated upon the frustration of the very basis on which the parties had become stockholders, and upon the emasculation of their stockholders' agreement, as well as of AFC's by-laws contract with its stockholders (Blue [206-15]).

We do not enlarge upon this action, because, for the purposes of this petition, its only significance is that it demonstrates that though Petitioners may have access to the Connecticut courts, to dissolve the corporation, it has thus far been held, that they may not do so to continue its existence according to its domiciliary law as expressed in Connecticut's statutes, and as the Connecticut courts may choose to interpret them. It is to contribute to AFC's continued existence, under Connecticut's aegis, that this petition is made.

Irrelevancies

It is plain from the foregoing that the case at bar involves only federal questions of Constitutional law, arising solely out of Respondents' enforcement, by way of the New York judgment of injunction, sought to be reviewed, of the judgment on the Berger-Merdingers' counterclaim for a declaratory judgment in the underlying New York action, which declaratory judgment projects its sanction forward, and into the State of Connecticut. The conduct of one of the Petitioners which led to the dismissal of the petitioners' complaint in the New York action, is not involved. Whether said petitioner, Leonard Mook—as he misguidedly stipulated might be assumed for the purposes of the underlying case only—was guilty of any breach of fiduciary obligation to AFC, is as irrelevant as is the adjudicated fac that Harry Merdinger (the dominant member of the Berger-Merdinger group) is not the kind of person who should administer other people's investments (see Blue, 162, citing *Bowen* v. *Merdinger* [196 Misc. 987, 92 N.Y.S. 2d 566; affd. 279 App. Div. 1060, 113 N.Y.S. 2d 282])—a reference which we make, to eliminate, once and

for all, the Berger-Merdingers' repeated interjection, below, of *ad hominem* arguments as to Leonard Mook, into what are questions of federal and constitutional law, which are and should be unentangled by personality considerations. For, whether or not it is Leonard Mook who may serve as a director, is wholly irrelevant to the propositions urged in this petition. It is indisputable that the Mooks may designate another to serve as a director (Buff, 327-329). No appeal was taken to the New York Court of Appeals from the dismissal of Petitioners' complaint in the underlying action—only from the declaratory judgment on Respondents' counterclaim! Therefore, no issue is presented, in the Connecticut Superior Court action, which concerns itself with Leonard Mook's present or future status in AFC.

Reasons and Argument for Allowance of Certiorari

I.

The contract documents require elucidation, as to AFC's government and regulation of its internal affairs, an elucidation, which can be authoritatively enforced, during AFC's continued existence, only by the Connecticut courts.

AFC's corporate by-laws constitute a contract with its stockholders (*Coules* v. *Coules Realty Co.*, 201 App. Div. 460, 194 N.Y.S. 546; *Matter of American Fibre, etc.*, 241 App. Div. 532, 272 N.Y.S. 206; affd. 265 N. Y. 416, 193 N. E. 253; rearg. den. 266 N. Y. 500, 195 N. E. 171; *Hassel* v. *Poble*, 214 App. Div. 654, 212 N.Y.S. 561; *Kent* v. *Quicksilver Mining Co.*, 78 N. Y. 159).

It will be observed that reference is made, in AFC's over-all "directors" by-law amendment, *supra*, page 71, to "directors of the Company" and to action "by the board"; yet, that the restriction prescribing the vote which shall be effective, refers to an "affirmative vote of six of the *Company's* members." A director "of the Company" is a member of its Board of Directors; but a "Company's member" is not ordinarily a director, but a stockholder. On the other hand, reference to "action *by the board*", justifies the conclusion that the parties, when they referred to "members" meant "directors". For only the vote of

"directors" expresses "action by the board." The loose and inept language of this over-all amendment was undoubtedly encouraged by the fact that the distinction between AFC's stockholders (excluding their "tax-absorbing" wives) and AFC's directors, seemed, in the case of AFC, to be of no practical significance, since its stockholders and directors were the same. As a result, it remained to be resolved whether the stockholders-directors intended to require (1) an affirmative vote of at least six of seven of AFC's Board of Directors, to make any action of said Board effective, or (2) a *quorum* of at least six of AFC's Board, which would guarantee participation in any decision by at least six of the board, but who would express their will by a majority of their number, i.e., of four or (3) both.

The objective of the parties—i.e., to give veto power to the Mooks, as well as to the Berger-Merdingers is clear enough. But whether they stipulated one piece of corporate mechanics or another, or both, is shrouded in the malaprop, but understandable phraseology of the stockholders' agreement, and of AFC's by-laws contract.

But there was and is no ambiguity, and it is indisputable, that it was an integral part of the parties' agreement that there should not be any change in the by-laws except on consent of 80% of the stockholders.

What may be the correct resolution of the inquiry as to the corporate mechanics intended, in the light of all the surrounding circumstances, is not the issue on this petition for certiorari! Only whether the Mooks shall be afforded the opportunity to have an adjudication made as to AFC's internal government, by Connecticut's courts in accordance with Connecticut statutes!

As said by this Court, what may "convey only doubts and confusion to one inexpert in the law of that [another] State", may "yet be entirely clear and consistent when placed in the mosaic of the whole law of that State." (*Brillhart* v. *Excess Insurance Co.*, 316 U. S. 491, 497).

Accordingly, to demonstrate that, in the "mosaic" of Connecticut's law, the Petitioners' contentions have sub-

stance, i.e., (1) that, in Connecticut, according to both its common and statutory law, a by-law was and is valid which requires that directors' action shall be expressed by more than a majority of the directors of a Connecticut corporation's members, and (2) that a by-law was and is valid which requires a directors' quorum of more than a bare majority—whatever be the correct interpretation of AFC's by-laws—we address ourselves to those propositions.

[In the following discussion of Connecticut's Corporation Law (to and including p. 34) we consider Connecticut's Corporation Laws as they were to January 1, 1961. All that we say, is so, *a fortiori*, in the light of Connecticut's new and *retroactive* Stock Corporation Act, in force since January 1, 1961 (see *infra*, p. 30, and footnote)]

As to Directors' Action Required to Be Expressed By a Vote in Excess of a Majority

Connecticut's Decisional Law Recognizes that a Connecticut Corporation may, in its By-Laws, Require a Directors' Vote in Excess of a Majority.

The early case of *State* v. *Tudor* (5 Day 329, 5 Am. Dec. 162, decided in 1812), long ago settled the very question of Connecticut corporate law here presented. For in the *Tudor* case, the court held in accord with the above heading.

The question at issue was whether "members of the company," i.e., stockholders, could vote by proxy. The Court held that

> "• • • *since the passing of the by-law above mentioned*, I am very clear that the votes for the officers of this corporation, as well as all other votes relative to it, may be given by proxy." (pp. 162-4)

Bator v. *United Sausage Company* (138 Conn. 18, 81 A. 2d 444), is the last pronouncement of the highest court of Connecticut on the subject. In that case, as between the sole stockholders of the corporation, who were also its sole directors:

> "It was agreed that the board of directors should consist only of the three parties to the contract and that 'all policies, management and operation' of the corporate business would be by the unanimous consent of the board." (p. 20)

The court's decision was that, although a stockholders' agreement requiring a high vote to make the action of directors effective, was not against Connecticut public policy, nevertheless plaintiff was not entitled to a dissolution, because—different from the situation here—*the corporation was not a party to the agreement* (p. 22), as the court concluded from the fact that "The corporate charter and *by-laws* were not offered in evidence" (p. 21).

The pronouncement of the court, which we quote—omitting only citations of authority—was crystal-clear:

> "The plaintiff has brought this action *against the corporation*, and not against his fellow stockholders and directors. The corporation was not a party to the agreement between the plaintiff and the Romans [the other stockholders] and cannot be bound thereby. Even though it is a so-called close corporation, with only three stockholders, it is nevertheless a legal entity with separate rights and powers conferred and duties and responsibilities imposed by law. • • •
>
> "The decisive question, • • • is not whether the agreement • • • was lawful, but whether, if it was, the corporation was affected by it." (pp. 21-2)

It was only because of the absence of any proof of the corporation's by-laws, that the court held that, in an action *against the corporation*, the contract did not have any "official sanction".

The very reasons given, in the *Bator* case, for denial of relief, show that the issue here presented would be decided to the contrary by the Connecticut courts, were they only given the opportunity to decide. For what was lacking, and by the Connecticut court, in the *Bator* case, considered to be a fatal omission, i.e., proof of the by-laws of the corporation, or of other evidence that the corporation was bound by contract, is present here.

Nor is it without significance, as confirming our reading of the *Bator* case, that other authorities so interpret its effect:

So, for instance, *Fletcher*, Cyclopedia of Corporations (Vol. 8, p. 813, § 4210) cites *Katcher* v. *Ohsman*, 26 N. J. Super. 28 [1953], 97 A. 2d 180, which in turn relies

upon the *Bator* case, for the proposition that the by-laws of a corporation may fix the quorum "at less than a majority, *and the number who must concur in voting on questions* • • •" (see footnote 66, and supplement, p. 97).

Connecticut Statute Law does not Prohibit, but on the Contrary, Affirmatively Authorizes the Adoption of By-Laws which may Require a High Vote for any Effective Action by Directors.

[Copy of Exhibit A, being a copy of the Connecticut Corporation Laws, offered and received (Buff, 205), will be handed up, pursuant to this Court's Rule 38].

Section 2570d (*infra*, p. 69 and p. 8 of Exhibit A) grants each corporation the "power, subject to such provisions and limitations as may be contained in its charter or certificate of incorporation or in any statute affecting it • • •

(6) to make by-laws, consistent with law, fixing the number of its directors *and for its government*, the regulation of its affairs and the management of its property; • • •"

In a Connecticut corporation, the by-laws are a part of its organic structure. Thus, it is required that at the first meeting of the incorporators, they "*shall* adopt by-laws for the regulation of the affairs of the corporation" (Section 5157 [p. 13 of Exhibit A]).

And:

"No corporation shall commence business • • • until its directors and officers have been duly elected *and its by-laws adopted*" (Section 2574-d, p. 14 of Exhibit A).

Furthermore, before a corporation may commence business, it must first file a certificate, setting forth:

(5) "• • • that the directors and officers of the corporation have been duly elected and its *by-laws* adopted" (Section 2574-d [p. 14 of Exhibit A]).

As said in Fletcher, *Cyclopedia Corporations*:

"• • • it is competent for the by-laws • • • to fix • • • the number of directors who shall constitute a quorum for the transaction of business • • • *and the number who must concur in voting on questions*" (Perm. ed., vol. 8, § 4210, pp. 810-813).

As to Directors' Action Required to Be Expressed by a Majority of a Quorum, the Quorum Being in Excess of a Majority

Connecticut Statute Law, as Amended in 1957, Expressly Authorizes the Adoption of By-Laws Which May Fix a High Quorum of a Corporation's Directors at Any Number Up to and Including Unanimity.

Section 5165 (p. 16 of Exhibit A, *infra*, pp. 70-1) as amended in 1957 (1957 Annex to 1956 Revision, at end of Exhibit A) states what shall constitute a quorum for directors' meetings:

> "A majority of the directors shall constitute a quorum for the transaction of business *unless* it is provided *in a by-law* * * * that *more or* less than a majority shall constitute a quorum * * *."

The italicized phrased "more or" was added by the amendment of 1957.

It is explicitly provided that the quorum requirement may be made in a by-law.

The effect of these statutory provisions may be fairly characterized to be that the by-laws may make any provision not explicitly otherwise made in statute or charter! AFC's Charter is utterly silent on the subject (Buff, 385).

Such being the case—and there being nothing to the contrary in AFC's charter (Ex. 5 [385])—certainly any provision in AFC's by-laws, fixing a directors' quorum of at least six members out of AFC's seven directors, was valid.

As to Connecticut's Authorization of Either or Both of the Foregoing

By so authorizing even a quorum, which requires unanimity, the 1957 Amendment of § 5165 of the Statute Supplemented the High Vote Requirement which had theretofore been recognized as valid in Connecticut's decisional law, and continued so to be.

Connecticut § 5165 (p. 16 of Exhibit A, *infra*, pp. 70-1), in this area treats of two different subjects: (1) what shall be

the quorum; and (2) by what vote shall that quorum express its will. On the first subject, it specifies what shall be a quorum of the Board of Directors, i.e., a "majority * * * ***unless it is provided in a by-law*** * * * that [as formerly expressed in § 5165] *less* than a majority shall constitute a quorum" or [as, since 1957, expressed in § 5165] that *more or* less than a majority shall constitute a quorum (§ 5165, Annex, Ex. A). As to the *votes* which may be required to reflect the quorum's will, the said statute explicitly authorizes a Connecticut corporation's stockholders ***to adopt by-laws*** "fixing the number of its directors *and for its government*, the regulation of its affairs and the management of its property * * *" (§ 2570-d; p. 8 of Exhibit A; see, also, § 5157 [p. 13]; § 5165 [Annex]).

The by-law here in question reflects either or both standards. It complies with the quorum specification, i.e., a bare majority or more, enjoined by the state. It evidences the exercise of the prerogative, which the statute gives to AFC's stockholders, to have the corporation's by-laws fix the number of votes required for effective action by the quorum. Therefore, since six out of seven directors constitute a quorum, if only a quorum of six be present, they must, under the by-laws, all concur in order to accomplish effective action.

Such was the Connecticut legislature's contribution, in 1957, in accordance with the decision, in 1951, of its Supreme Court, in the *Bator* case, to clarification of its "close corporation" problem.

That the statutory amendment was declaratory of existing law, and was intended to set at rest any further debate about it, is shown by the proceedings in the Connecticut legislature. The original revision of § 5165 as it now appears in Exhibit A (*infra*, pp. 70-1)—except for the addition of the words "*more or*" (*supra*), was made by Public Act 103 [1957]. The words "*more or*" (*supra*), were then interpolated by Public Act 189 [1957], which was specially enacted for that purpose. We quote from what was said on the floor [a certified copy thereof having been submitted to the New York Court of Appeals, and a

copy thereof handed up with the exhibits]:

"This would tend to clarify Section 5165 of the General Statutes and provide for flexibility of quorum requirements for boards of directors' meetings.

"At the present time there is a serious question as to whether or not a minority director could give himself the protection under the existing statutes. For example, supposing you wanted a three quarter ***vote*** under the existing statutes there is a question, and I think the bill will clarify it." (Mr. Maurice Gersten of Simsbury, on the floor, with reference to the bill [H. B. 1831, i.e., the amendment of Sec. 5165], recommended by the Incorporations Committee, Thursday, March 28, 1957.)

It is thus plain that "quorum", and "vote" were considered as interchangeable or supplementary means of accomplishing the same desired end. i.e., control by more than a majority of a corporation's stockholders through either or both mechanics, i.e., quorum or high vote!

Accordingly, AFC's 1953 at large and overall by-law amendment was undoubtedly made to accomplish both a high quorum and a high vote. "Many lawyers apparently are of the opinion that the use of both high quorum and high vote requirements sets up a double hurdle that objectionable action must clear before it will be operative" (O'Neal —*Close Corporations* [1958], Vol. I, § 4.22, p. 209).

The 1957 amendment, accordingly, applied to AFC, because it applied to corporations theretofore organized and to their organization and internal government, which thenceforth were retroactively ruled by the same principle—which was not a new one (*New Haven* v. *Derby R.R. Co.*, 38 Conn. 56).

Connecticut's § 5126 reads as follows:

"• • • All acts creating or authorizing the organization of corporations or altering the charters of corporations, which have been or shall be passed by the general assembly • • • shall be subject to alteration, amendment and repeal at the pleasure of the general assembly, unless otherwise expressly provided in such acts • • • and all such amendments shall apply to every corporation except in so far as is otherwise expressly provided." (p. 6 of Exhibit A)

The Word "Majority" has a Variable Connotation, i.e., from a Number Constituting more than One-Half of the Membership, to any Number less than Unanimity. Accordingly, Connecticut's 1957 Amendment of § 5165 Declared what had theretofore been Connecticut Law as Formulated in Statute and Decision, though New York's common, and statutory law was formerly to the contrary.

The basic difficulty with the New York Court of Appeals' approach to what it deemed to be Connecticut's corporation law, was that it rationalized its decision in terms of its own interpretation of New York's *Statute* (which the New York Court of Appeals had held—as it alone could decide as to New York's statutory law —compelled adherence to its definition of the word "majority" as connoting a *bare* majority and excluding any variable number in excess of half—an interpretation other than was or is either general or customary). So, it will be observed from the New York Special Term findings in the underlying declaratory judgment action (Buff, 67 ff., *infra*, pp. 58-62), that decision as to what was deemed to be Connecticut common law was predicated upon what the New York court found its own common law to be, in *Benintendi* v. *Kenton Hotel, Inc.* (294 N. Y. 112), which conclusion was reached on the New York Court of Appeals' interpretation, in that case, of the old English *Dr. Hascard* v. *Dr. Somany* case (1 Freeman 503—p. 119 of *Benintendi* opinion) and of the old New York case of *Ex Parte Willcocks* (7 Cow. 401—p. 119 of *Benintendi* opinion). However, a reading of those cases will show that even in those days, in neither of the cited cases was it held that "majority" meant only a *bare* majority. Both cases held no more than that nothing less than a bare majority would suffice to express the will of the duly constituted group—not that "majority" meant only "bare" majority, and excluded any variable in excess of one-half! Connecticut's courts might have read the cited cases as we read them—we respectfully submit, correctly—and Connecticut's courts might, with ample reason have reached a different conclusion from that of the New York Court of Appeals, as the Connecticut courts had the right to do. Indeed, there was

immediate dissatisfaction with New York's appraisal of its own common law, and of its statute, with the result that the New York Legislature quite promptly expressed its disapproval of the consequences of the *Benintendi* case, as evidenced in the 1951 amendments of the New York Stock Corporation Law, § 9, and New York General Corporation Law, § 27, permitting what the New York Court of Appeals had said the common law forbade, to be accomplished by provision in the charter.

The fact is that New York's statute (prior to its amendment in 1951; cf. General Corporation Law § 27 as it was) undoubtedly influenced the New York Court of Appeals' extraordinary concept of "majority" as a bare majority. It was really its own statute, and not the common law, which the New York court was interpreting, under what, according to the general view, was its misconception of what was the common law. Indeed, under Chapter 855 of the Laws of 1961, effective April 1, 1963, New York, persisting in the reversal of its own former public policy, would now hold valid what theretofore its courts had held invalid (§§ 620, 707-709; § 103—giving the statute retroactive effect).

The uniform trend of the authorities is not in accord with New York's former view.

Moreover, in the presence of Connecticut's *statute* law, Connecticut, it may be presumed, would apply that *statute* law, and not any superseded common law, whatever it was. And, indeed, in view of the amendment to Connecticut's Stock Corporation Act, *now* effective—i.e., as of January 1, 1961—and unquestionably retroactive (§ 33-418; Public Act 618, Laws 1959, § 136), precisely what the New York courts said was invalid under Connecticut law, is now declared to be valid—as, we submit, it always was valid.*

* § 33-316; Public Act 618, Laws 1959, § 35 reads:

"(b) A majority of the number of directorships at the time shall constitute a quorum for the transaction of business unless the by-laws specify a greater quorum or a by-law adopted by shareholders specifies a lesser quorum, but not less than one third of the number of directorships or less than two."

"(c) The act of a majority of the directors present at a meeting at which a quorum is present at the time of the act shall be the act of the board of directors, unless the act of a greater number is required by the by-laws or this chapter."

So, also, under a statute substantially the same as that formerly of New York (which was considered in the *Benintendi* case), the highest court of Maryland, in 1954, reached a conclusion opposed to that reached in the *Benintendi* case (*Roland Park, etc.* v. *Hendler*, 206 Md. 10, 109 A. 2d 753). In that case, a statute required that by-laws stipulating concurrence of more than a bare majority of members of a board of directors, be converted, within a period of three years, into amendments of the corporate charter, in which event, if the by-laws had been valid before, they would continue to be valid. One of the issues presented was whether the restrictive *by-law* involved was valid before. The court held that it was, and that, therefore, it would be enforced. We quote from the opinion, because it so well summarizes our appraisal as to what we believe always to have been the law of Connecticut:

> "The courts have shown an increasing tendency to hold such requirements valid even where there is no express statutory authority for the provision but merely no conflict with the statute. * * * The potential tyranny of a minority, having a veto power, is no worse than the possible autocracy of a majority, particularly where, in either case, the parties go in with eyes open." (p. 21)

To the same effect: 62 *Harvard Law Review* 526; 15 *Brooklyn Law Review* 150; Leg. Doc. [1957] No. 17, being *"Interim Report to 1957 Session of New York State Legislature"*; see also, Judge Rutledge's general views in 22 *Washington University Law Quarterly* 305, particularly at pp. 338-339; 33 *New York University Law Review* 700; 58 *Yale Law Journal* 795, which is particularly informative because of its review of the law in the various states.

So, as defined in the dictionaries, and as used in customary English—which includes statutory usage—a "majority" is:

> "The greater of two numbers that are regarded as parts of a whole or total; the number greater than half; more than half of any total; also, the excess of this greater number, as of votes, over the remainder of the total;"

i.e., "The group or party whose votes preponderate"

(Webster: *International Dictionary;* to the same effect: *Funk & Wagnall's New Standard Dictionary*).

As was said in *Town of Solon* v. *Williamsburgh Savings Bank* (114 N. Y. 122, 21 N. E. 168), a majority is "More than one-half of the whole of any number of persons or things" (p. 131).

Such is the universal significance of the concept "majority", whether—as we have seen—according to the lexicographers, or according to the courts, and also in parliamentary procedure (Robert's "*Rules of Order*" [75th Anniv. ed.], pp. 24, 202, 260).

Universal English usage is confirmatory of our view.

As said in Halsbury's "*Laws of England*" [2d ed.] (Vol. 8, p. 54): "Where, therefore, a corporation consists of thirteen members, there ought to be *at least* seven present • • •."

High authority supporting definition of "majority", as connoting a variable number ranging from a bare majority to unanimity, will be found in the five-judge decision (in banc) of the Third Circuit Court of Appeals in *Alltmont* v. *U. S.* (177 F. 2d 971; cert. den. 339 U. S. 967), in which it was held—interpreting the statutory quorum provisions as to its own constituency under 28 U.S.C.A. § 46:

> "The number of judges authorized under paragraph (c) to constitute the United States Court of Appeals for the Third Circuit in banc being seven, four *or more* of them are clearly a quorum under paragraph (d)" [p. 973]

Put succinctly:

> "The term 'majority' when referring to three named persons and applied to a course of action by 'a majority of such thereof as shall act' means • • • such action by *more than half* of those entitled to act." (*Callister* v. *Graham-Paige Corporation,* 146 F. Supp. 399, 403)

The history of Connecticut's § 5165 furnishes evidence that the word "majority", as used therein (*infra,* pp. 70-1) always connoted what, in English usage, it always has meant and means, i.e., not a bare majority, but a variable from a number more than half up to all.

Prior to 1903, the statute read:

"§ 3337. Quorum of Directors. A majority of the directors of every corporation convened according to its by-laws shall constitute a quorum for the transaction of business." (Chapter 197 of Title 22 of General Statutes of Connecticut, Revision of 1902, p. 839.)

In 1903, the statute was amended to read as follows:

"• • • A majority of the directors shall constitute a quorum for the transaction of business unless it is provided in a by-law adopted by a stockholders' meeting that *less than a majority* shall constitute a quorum." (Chapter 194, Public Acts 1903, § 10.)

So this statute appears in the revision of 1949 (Ex. A, p. 16, § 5165).

The words "more or"—preceding "less"—were introduced by the amendment of 1957 (Annex, Ex. A, p. 2, § 5165 [Pub. Act 189]).

It is difficult to believe that when, in 1903, the Connecticut legislature innovated the concept that "*less* than a majority" might constitute a quorum, it also intended that anything more than a *bare* majority *should not*. An incredible result!

Moreover, it is plain that the purpose was more than merely to permit a high vote—less than unanimity—for, otherwise, it was not necessary to authorize a quorum of "more than a majority". For "more" than a majority is unanimity. The purpose of the amendment was, therefore, to declare not merely what was, by consensus, always so, i.e., that a quorum might consist of any number from more than half to unanimity, but, including what had been decited by the Connecticut *Bator* case, unanimity itself.

Obviously, this must be so, or we should have the ludicrous result that under Connecticut's § 5165, a majority of four might constitute a quorum of a board of seven, but a majority of six might not; and a statute devised to prevent action by less than a bare majority, would be construed to prohibit action by more than a *bare* majority!

Moreover, we should have the ridiculous result that one

director might constitute a quorum of an entire Board of seven, but six members might not.

Thus, in every case, in which the Connecticut statute, before 1957, prescribed action by a majority of directors, common sense tells us, and the statute too, that what was required, was action by *at least a bare* majority, and that, of course, *if the by-laws stipulated a majority larger than that,* so much the better (cf. Sec. 5219 [p. 29]; Sec. 5234 [p. 35]; Sec. 2574d [p. 14]—where there are such provisions as to directors).

The following provisions of the Connecticut statute also support our conclusion:

So, § 5219 (Annex, Exhibit A, p. 3) provides that a certificate amending the corporation's charter "shall be made by a majority of the directors, and filed * * *".

So, also, § 5248 (Annex, Exhibit A, p. 4) similarly provides.

So, also, § 2574-d (Exhibit A, p. 14) provides that "a majority of its directors" shall cause a certificate of organization to be filed.

Can it be that, in each of these instances, it is only a bare majority, which is contemplated, and that, therefore, it is a disobedience of the statute for a majority of six out of seven directors to sign the appropriate certificate?

It may, therefore, be presumed that, the meaning of "majority" as used in Connecticut's § 5165 before 1957, and as so elucidated by the 1957 amendment was variable, up to unanimity.

At least, it was and is for Connecticut to formulate its own statutory law, one way or the other! Such was and is the mandate of the "Full Faith and Credit" clause of the Constitution of the United States!

II.

Under the extraordinary principles applicable to a question of public policy inherent in interstate comity concepts—which public policy here concerns itself with the interpretation and construction of Connecticut's statute law as applied to the organic structure of a Connecticut corporation—New York was not entitled to enforce its declaratory judgment in Connecticut, as it did by issuing an injunction, which prevented access to the Connecticut courts, and thus not only to prevent said courts from themselves deciding and enforcing Connecticut's own policy as to what New York had decided, but also from deciding other issues on which New York had not passed.

Though the doctrine of *res judicata* is one of public policy and private peace, nevertheless, to appraise the problem here presented, in terms of *res judicata*, is to subordinate fundamental public policy, essential to the function of a federated government such as ours, to private advantage, and to administer discipline to litigants *all of whom* lost their way in conducting a litigation. Such is the basic error of the New York courts, which we pray this Court to permit Connecticut to correct—in the exercise of its own prerogatives, which New York has transgressed. For, because Petitioners, in the underlying action, mistakenly invoked the New York courts, and Respondents, on their part, joined in that erroneous procedure, Petitioners have, in effect, thus far been told that their mistake is irrevocable, but Respondents, by the same standard, have been rewarded so that their declaratory judgment remains forever to their own advantage, though the sanction thus administered to the prejudice only of Petitioners, enables Respondents to conduct a Connecticut corporation under New York's laws, in utter disregard of Connecticut's statutes, and what may be Connecticut's interpretation of its own present or future public policy.

Such a result is unthinkable:

"• • • *res judicata, as the embodiment of a public policy, must, at times, be weighed against competing in-*

terests, and must, on occasion, yield to other policies." (*Spilker* v. *Hankin*, 188 F. 2d 35, 39—C. A., D. C.; cf. Learned Hand, J., in *Lyons* v. *Westinghouse Elec. Corp.*, 222 F. 2d 184, 189, quoting Goodrich, J.; cert. den. 350 U. S. 825.)

What more demanding public interest is conceivable, to which local principles of *res judicata* should yield, than the sovereign right of a sister state, in a federal system, which depends for its security and for its continuance upon the mutual respect of each of the states for the exclusive prerogatives of the others, to govern its own creatures?

The questions here presented, as far as we have been able to ascertain, are of first impression. They are quite unconcerned with the undoubted right and duty of a State court to apply foreign law as an incident of awarding consequential relief, as for instance, money damages or other consequential relief (Cf. *Rogers* v. *Guaranty Trust Co. of N. Y.*, 288 U. S. 123; with *Williams* v. *Green Bay & W. R. Co.*, 326 U. S. 549; *Reilly* v. *Steinhart*, 217 N. Y. 549; *Rubin* v. *Irving Trust Co.*, 305 N. Y. 288, 113 N. E. 2d 424; *Perutz* v. *Bohemian Discount Bank*, 304 N. Y. 533, 110 N. E. 2d 6). Here the issue is not as to whether a judgment creditor may enforce his judgment in the forum, or by suing thereon, in another State, but rather whether in an area in which enforcement of the public policy of another State is involved, the courts of the forum may declare what it deems to be the public policy of that other State—not only as incidental to a judgment for consequential relief, but by injunction so as to prevent that other State from declaring its own public policy as to its own corporate creatures, and for their internal government now, and in the future! For, here, we are squarely within the area of "recognized public policy", in which it is the duty of our courts *not* to declare what it thinks to be the law of another jurisdiction (*Meredith* v. *Winter Haven*, 320 U. S. 228, 234, 235).

The authorities most analogous to the principles here applicable have been decided in the State courts. But,

though there is no *decision* by this court, the applicable fundamental principles, in varying situations, have been formulated by this Court in its regulation of the restraints to be observed by the federal courts in ascertaining and enforcing the public policy and laws of the several States.

This Court has set the pattern. Whether that pattern shall, by reason of constitutional command, be applied to interstate relations, is the issue here!

We proceed with an exposition of the authorities, and of the principles enunciated by this Court.

As said by the New York Court of Appeals, with reference to the prerogatives of a State Labor Board—quite humble in the hierarchy of official public entities as compared with a sovereign State:

> "No principle of '*res judicata*' or of 'estoppel' and no public policy precludes an investigation of the facts by the Labor Board in the public interest or bars the Board from making a valid order commanding the Employer to 'cease and desist' from acts which • • • constitute 'a *continuing* means of thwarting the policy of the Act.'" (*Matter of N. Y. State Labor Relations Bd.* v. *Holland Laundry*, 294 N. Y. 480, 495-6, 63 N. E. 2d 68.)

Westchester Mortgage Co. v. *Grand Rapids, etc., R. R. Co.* (246 N. Y. 194, 158 N. E. 70), is in point. In that case, a note was made and delivered in Rhode Island, with the intention that the transaction should be governed by the laws of Rhode Island, which permitted interest at a rate which, in New York, would be usurious. A property right in a Rhode Island testamentary trust fund was given as collateral security. The note not having been paid, the payee's assignee sued in New York, interpleading the maker of the note and others who claimed an interest in the underlying property, for a declaratory judgment that the plaintiff had a prior and paramount lien on the trust fund. Among other things, the maker of the note asked for a declaration that the note and assignment were usurious and void. All parties joined in the prayer for a declaratory judgment, one way or the other—a fact worthy of note, as showing that the public policy prin-

ciple may not be shaped by the conduct of the litigants so as to benefit some by prejudicing the others! The threshold question was as to whether it was the New York or the Rhode Island law which governed. The New York Supreme Court had held that the transaction was governed by the law of Rhode Island, and, therefore, was not usurious; *but then proceeded to declare to what extent the note and assignment might be enforced in Rhode Island.* The New York Court of Appeals (Opinion by Lehman, J.) held that, though the Supreme Court had correctly held that it was not the New York, but the Rhode Island law, which governed the transaction before it, once that question was decided, New York had no power to declare how and to what extent the lien might be enforced under Rhode Island law, which State alone had the prerogative of enforcing the lien on property there situated:

> "The courts of this State may command only in matters where this State is sovereign. The powers of our courts do not extend beyond the territorial limits of the State, and our courts proceed with circumspection when they are called upon to give command *even to a party whose person is subject to our own jurisdiction*, if such command might possibly conflict with the sovereign power of another State." (pp. 199-200)

After explaining that notwithstanding that a court may declare what is foreign law applicable to a litigation pending in its jurisdiction, it may not "dictate" what shall be its "enforcement", in another State, the New York Court of Appeals continued:

> "If that is the purpose and effect of the declaration made in this case, then it would seem clear that such a declaration should not have been made." (p. 201)

The injunction judgment sought to be reviewed has the coercive effect of enforcement!

The New York Court of Appeals thus put the very proposition, which we urge:

> "It may perhaps be said that the purpose and effect of the declaratory judgment is not so much to bind the courts of the State of Rhode Island in the determination of the extent to which they may enforce a lien on prop-

erty within that State as to preclude the parties from again litigating in that State an issue already determined here. Even if that be the result of the judgment rendered in this case, ***the fact still remains that the courts here have determined that issue without any purpose of granting relief here, and not as part of a declaration of 'rights' which may be made effective here without resort to the courts of a foreign sovereignty, or of 'legal relations,' with consequential result here between persons within the jurisdiction of our own courts.*** The plaintiff's rights against the property in Rhode Island are rights *in rem*. They can be enforced solely by the courts of Rhode Island." (pp. 201-202)

To the same effect: *Niagara Falls Internatl. Bridge Company* v. *Grand Trunk Ry. Co.* (241 N. Y. 85, 93, 148 N. E. 797).

The issue is one which may not be determined by error of the parties in selecting the proper forum. It inheres in basic concepts of interstate relation, not in procedural fault or default.

Under the circumstances here present, a court may and should *sua sponte* dismiss a prayer for declaratory judgment, even though the parties to the litigation may not have made the point. (Judge Learned Hand in *Weiss* v. *Routh*, 149 F. 2d 193 [CA 2]; Judge Fuld dissenting in *Long Park Inc.* v. *Trenton New Brunswick*, 297 N. Y. 174, 184, 77 N. E. 2d 633—there being no difference of opinion on this point; Stone, J., in *Pennsylvania* v. *Williams*, 294 U. S. 176, 182.) As said by Judge Learned Hand in *Weiss* v. *Routh (supra)*:

"That question was not raised before Judge Goddard or before us: we have taken the objection of our own motion, for upon it depends the propriety of entertaining the action at all." (p. 195)

Indeed, while the New York Court of Appeals has not thus far, in so many words, decided whether the objection is to "absence of jurisdiction in the strict sense or to the inability to make a decree effective, or to considerations of policy and discretion" (*Travis* v. *Knox Terpezone Co.*, 215 N. Y. 259, 263, 109 N. E. 250; cf. *Long Park*

case, 297 N. Y. 174, 183, 77 N. E. 2d 633), the injunction sought to be reviewed violates all of these standards; and it has been held that an issue of this character goes to lack of jurisdiction of subject matter (Botein, J., in *Rohlsen* v. *Latin American Airways*, 65 N.Y.S. 2d 644).

So it was held in *Sauerbrunn* v. *Hartford Life Ins. Co.* (220 N. Y. 363, 371-2, 115 N. E. 1001) that the fact that the defendant had appeared, did not confer jurisdiction to render a declaratory judgment with respect to matters touching the "internal affairs of the corporation as ought to be regulated only by the courts of the State or country to which it owes its existence" (p. 371, quoting from *Andrews* v. *Mines Corporation*, 205 Mass. 121, 123, 91 N. E. 122).

To the same effect: *Healey* v. *R. J. Reynolds Tobacco Co.*, 48 F. S. 207 [No. Car.].

Indeed, since a declaratory judgment is rendered by a court of equity, it has been held that a decree should not be made, where there is another adequate remedy at hand (*Public Service Commission of Utah* v. *Wycoff Co.*, 344 U. S. 237).

It is enough—to suggest that jurisdiction be relinquished—that the law of the domiciliary jurisdiction furnishes, as here, "easy and ample means for determining" the question (*Railroad Comm'n* v. *Pullman Co.*, 312 U. S. 496, 501). Whether the courts of one jurisdiction or of another were first invoked is immaterial (*Burford* v. *Sun Oil Co.*, 319 U. S. 315, 335).

As said in *Marshall* v. *Sherman* (148 N. Y. 9, 42 N. E. 419), i.e., that "The defendant's relation to the corporation is governed by the laws of the state of its creation," and that "the general current of authority is to the effect that such enactments are to be enforced only within the jurisdiction of the sovereignty where they exist" (pp. 18-19). (Cf. *Vanderveer* v. *Erie Malleable Iron Company*, 238 F. 2nd [CA 3] 510, particularly at p. 515, cert. den. 353 U. S. 937; *U. S.* v. *Silliman*, 167 F. 2nd [CA 3] 607, particularly at p. 615; cert. den. 335 U. S. 825; *Messing* v. *The Barr Corporation*, 148 F. Supp. 58; *Gart* v. *Cole*,

166 F. Supp. 129, 132-3.) Consequential relief, without projected enforcing effect of another State's public policy into that other jurisdiction, is one thing! Enforcement, by injunction, of the forum's concept of another State's public policy, by prohibiting access to its courts, quite another! (Cf. *Becher* v. *Contoure Laboratories*, 279 U. S. 388, 391).

So West Virginia's Supreme Court in *Simms* v. *Garrett* (114 W. Va. 19, 170 S. E. 423), refused to exercise jurisdiction in a situation quite similar to that here, because it appeared "beyond cavil that the determining questions arise under the application of Wyoming [here Connecticut] laws, that they are of serious import, and that they have never been decided by the Wyoming courts" (pp. 24-5).

To the same effect: *Van Denburgh* v. *Tungsten Reef Mines Co.* (48 Ariz. 540, 63 P. 2d 647).

The forbidden result should not be countenanced when, as here, the illicit purpose is accomplished in a two-stage operation, by omitting consequential relief from the underlying declaratory judgment, and enforcing that declaratory judgment, nevertheless, by supplementary injunction.

So:

In *Fitzgerald* v. *Niles Bement Pond Co.* (274 App. Div. 499, 84 N.Y.S. 2d 779), an application for an injunction was denied, and the parties remitted to the Connecticut court for resolution of the Connecticut problem.

In *Lydia E. Pinkham, etc.* v. *Gove* (298 Mass. 53, 9 N. E. 2d 573), it was said, in dissolving a preliminary injunction which had been granted, restraining a Maine corporation from seeking dissolution in that State:

> "• • • we ought not so to exercise our own jurisdiction as to deprive these defendants permanently of access to the tribunal which alone can determine whether their prayers should be granted." (p. 66)

So, the full-faith-and-credit clause does not compel compliance with such a decision (*Alaska Packers Assn.* v. *Commissioner*, 294 U. S. 532, 546; *Magnolia Petroleum Co.* v. *Hunt*, 320 U. S. 430, 438; see, also, *Pink* v. *A.A.A.*

Highway, etc., 314 U. S. 201, 210-211; *Milwaukee County* v. *White Co.*, 296 U. S. 268, 273; *May* v. *Anderson*, 345 U. S. 528). The principle is the same as that formulated in *Carpenter* v. *Strange* (141 U. S. 87), and the cases following it, in which it was held that an adjudication as to the title to real estate, made in a State other than that in which the real property was located, was not entitled to full faith and credit in the State of the real property's situs.

AFC's corporate entity is a *res* within the State of Connecticut. (*Rogers* v. *Guaranty Trust Co.*, 288 U. S. 123, 132; cf. *Everett* v. *Everett*, 22 App. Div. 473, 47 N.Y.S. 994; per Willard Bartlett, J.).

By these standards, the Full Faith and Credit clause, which commands respect for Connecticut's statutes, forbids the injunction here sought to be reviewed.

Rules of comity, essential to the function of a federal system, require self-discipline to refrain from such enforcing efforts (*Spector Motor Service* v. *Walsh*, 323 U. S. 101, 104; *Union Pacific R.R. Co.* v. *Weld County*, 247 U. S. 282, 287; *Wichita Royalty Co.* v. *City Bank*, 306 U. S. 103, 109; *Hartford Life Ins. Co.* v. *Ibs*, 237 U. S. 662, 671; *Rodgers* v. *Insurance Co.*, 148 N. Y. 34, 39, 42 N. E. 515).

In *Lyons* v. *Westinghouse Elec. Corp.* (222 F. 2nd 184 [CA 2]; cert. den. 350 U. S. 825), a stay of an action pending in the Southern District was granted by a judge of said court. Thereupon, an appeal was taken to the federal Court of Appeals and, in the alternative, a mandamus prayed for to direct the district judge to vacate such stay. It is in the reasons given for the grant of mandamus that we discern the standard for decision here:

Westinghouse had sued, in the New York Supreme Court, against Lyons and his partner, for breach of contract. The Lyons partners, by way of defense in that action, alleged that Westinghouse had participated in a conspiracy, in violation of the anti-trust laws. The case went to trial, and Westinghouse prevailed. An interlocutory judgment, containing appropriate findings—among them, that Westinghouse had not violated the anti-trust laws—was

made. Appeal from that judgment was taken to the New York Appellate Division, where the judgment was affirmed. Following the Appellate Division's affirmance, the Lyons partners commenced the federal action. There, they were met by the motion for a stay of the federal action, and the stay was granted.

On appeal, the Court held that all issues as to the right of the matter had been decided by the New York interlocutory judgment, so that nothing remained for decision in the New York courts but the accounting, which had been directed. Nevertheless, though the Court presumed, that, therefore, according to ordinary principles, a complete and absolute estoppel would follow, it vacated the stay because, in this situation, the federal courts could not thus be estopped—even by a final judgment of the New York court. And this Court approved.

So, Judge Hand said:

> "It does not * * * follow that final judgment in the state action when entered will be an estoppel in the case at bar." (p. 188)

and defined the issue to be whether

> "* * * the district court must have unfettered power to decide the claim, regardless of the findings of any other courts, even when these were essential to the decision of actions over which their jurisdiction was unquestioned." (p. 188)

As said in *Railroad Commission* v. *Pullman Co.* (312 U. S. 496), as to the federal system, and just as applicable to the forbearance which one state owes to another:

> "These cases reflect a doctrine of abstention appropriate to our federal system whereby the federal courts, 'exercising a wise discretion', restrain their authority because of 'scrupulous regard for the rightful independence of the state governments' and for the smooth working of the federal judiciary." (p. 501)

As said in *Public Service Commission* v. *Wycoff Co.* (344 U. S. 237), the courts "must be alert to avoid imposition upon their jurisdiction * * * especially in the field of public law" so that "the declaratory judgment procedure will

not be used to preempt and *prejudge* issues that are committed for initial decision" to other authorities—certainly not to procure a declaration, which shall be "*res judicata*" so that the appropriate body cannot "decide any matter for itself." (pp. 243, 246-7). These principles are immune to the vagaries of litigants. They were formulated to protect, not the litigants, but the state itself as a constituent of a federation of States with reciprocal rights and duties.

It is, therefore, that it is incumbent on the court itself to "stay its hand", and even for the courts "to relinquish their jurisdiction." (*Pennsylvania* v. *Williams*, 294 U. S. 176, 185.) It is "in the public interest" that the courts should "avoid needless obstruction of the domestic policy of the states." (*Great Lake Dredge & Dock Co.* v. *Huffman*, 319 U. S. 293, 298.)

These principles apply, *a fortiori*, where there is doubt as to what is the law of another sovereignty in the federal system. (*Brillhart* v. *Excess Insurance Co.*, 316 U. S. 491, 497).

Nor is it any answer to these observations to say, as did the Berger-Merdingers below, that the New York injunction judgment herein does not enjoin Connecticut or its courts, but only New York's own citizens, i.e., the Mooks. The Connecticut Superior Court action was *sub judice* when the injunction issued (Gray, 274, 278-281). Any attempt to distinguish between (1) the propriety of an injunction restraining the Mooks from prosecuting their litigation in Connecticut, and (2) an injunction restraining the Connecticut courts themselves, is quite unrealistic. The effect of the injunction, as recognized in the *Westchester* case (*supra*, pp. 37 ff), is that it runs against the Connecticut courts. For when New York, because it has declared what it conceives to be Connecticut's public policy, enjoins New York citizens from suing in Connecticut's courts, to obtain enforcement of Connecticut's prerogatives as to its own corporation, in effect, it paralyzes Connecticut's courts, and enforces its determination of what is and shall be Connecticut law as to that corporation's internal government.

Ordinary rules, applicable to the run-of-the-mine cases —which are the basis for the text-book distinctions between restraint of parties and restraint of courts—have no application here. The fundamental principles of interstate comity, and the mutual forbearance required of sister States, should not be frustrated by any intellectual *tour de force*. It is of New York's obligation to refrain from judicially legislating and enforcing Connecticut's public policy that we treat here, and of Connecticut's right to expect New York to exercise the appropriate self-discipline so that litigants shall not be prevented from setting Connecticut's judicial processes in motion as to that which is exclusively Connecticut's prerogative. So, even as to litigants all of whom have mistaken their remedy! For the mutual forebearance incident to the basic public policy here involved, is of more importance than to discipline litigants, all of whom have lost their way! In the area of public policy and interstate comity, prevention of access to the Courts of the corporation's domicile unduly disturbs the delicate balance incident to interstate business activity. This Court recognized this fact in interpreting a federal statute, which left room for choice as to whether this Court would subscribe to an ephemeral intellectual concept that only the parties were restrained, or rather to the hard core of realistic fact that it was the coordinate sovereignty, which was obstructed. (*Oklahoma Packing Co.* v. *Oklahoma Gas & Elect. Co.*, 309 U. S. 4, 9; cf. *Amalgamated Clothing Workers of America* v. *Richman Brothers*, 348 U. S. 511, 514; see discussion, *Manufacturers Record Publishing Co.* v. *Lauer*, 169 F. Supp. 234, 238 [U.S.D.C., La.].)

> "The use of the injunctive power to prohibit a person from resorting to a foreign court is a power rarely and sparingly employed, for it represents a challenge albeit an indirect one, to the dignity and authority of that court." (*Arpels* v. *Arpels*, 3 N. Y. 2d 338, 341, 170 N. E. 2d 670.)

It is in the light of these principles, that the basic errors inherent in the judgment now under consideration, become readily apparent. As reflected in the Special Term opin-

ion of Mr. Justice Gavagan (*infra*, p. 50), the New York Courts thought that the underlying issue was "whether the judgment in the prior action is *res judicata* of the Connecticut action and if so whether such a defense should be resolved here or in the courts of Connecticut" (Gray, 293). Thus, did the New York Special Term confuse principles applicable to a State's conventional judgments for consequential relief, and abstract declarations as to another State's public policy, capable of executory enforcement only in that other State having the exclusive prerogative to do so. For the issue here is whether New York may *enforce* its own interpretation of Connecticut public policy, and as to AFC, impose its own interpretation on Connecticut as to how Connecticut's corporation should be governed—and be enabled to do so by the circumstance that all of AFC's stockholders are citizens of New York.

So, confusing declaration with enforcement, and misapplying to the declaratory judgment here involved, rules of *res judicata*, in any event operative only in ordinary actions, awarding consequential relief, the New York courts applied the conventional principles of *Milliken* v. *Meyer* (311 U. S. 457, 463), in which both the facts and the law are without analogy to the case at bar, because there was not in that case, any issue of declaratory judgment or of enforcement thereof in another jurisdiction, or of invasion of the public policy prerogatives of another State, and which case, therefore, is without the slightest application.

The result is that, not merely the Mooks, but the Connecticut courts themselves, have been stopped in their tracks, except to dissolve the corporation. Regulate and govern their own corporation, and keep it alive to serve the purposes of the parties, as agreed between them, and in accordance with its own domiciliary law, Connecticut may not! Indeed the Connecticut corporation itself is thus enabled to escape regulation of its internal affairs by the courts of its own domicile!

III.

The injunction granted violates § 1 of Amendment XIV of the Constitution of the United States, in that it abridges the privileges and immunities of the Mooks, as citizens of the United States; deprives them of their property without due process of law, and denies them the equal protection of the law; and also denies to the Mooks, as well as to AFC, the rights guaranteed by the Full Faith and Credit clause of the Constitution of the United States.

The result of the judgment sought to be reviewed is that the Mooks—all citizens of New York—have been deprived of their rights, privileges and immunities as such citizens, in that they have been prevented from suing in the Connecticut courts for the government and regulation of their Connecticut corporation (*Chambers* v. *Baltimore & O. R. Co.*, 207 U. S. 142); and furthermore, in that the Connecticut corporation itself has been enabled to escape the regulation to which it is subject by the courts of its own domicile. Moreover, even if it be deemed that the corporation has merely been deprived of the protection afforded by Connecticut's courts, nevertheless, the Corporation's rights as a citizen of that State have been infringed (*Nashua & Lowell R. Corp.* v. *Boston & Lowell R. Corp.*, 136 U. S. 356, 370).

The right of a New York citizen to invoke the courts of Connecticut to regulate a corporation, as to the government of which, Connecticut has the exclusive prerogative, is, indeed, substantial. The issue is not merely one of *forum conveniens*, but of fundamental right:

> "We are considering another state's power to so control its own citizens that they cannot exercise the federal privilege of litigating a federal right in the court of another state." (*Miles* v. *Illinois Central R. Co.*, 315 U. S. 698, 704)
>
> "The intention of Section 2 of Article IV was to confer on the citizens of the several states a general citizenship, and to communicate all the privileges and immunities which the citizens of the same State would be entitled to under the like circumstances, and this includes the right to institute actions." (*Cole* v. *Cunningham*, 133 U. S. 107, 114)

Accordingly, the issue is the same as if all of AFC's stockholders were citizens and residents of Connecticut, and New York had restrained them from applying to Connecticut's courts, as to the internal affairs of AFC. The issue is whether, under the applicable provisions of the Constitution of the United States, and the adjustment thereunder of the relationship to each other of the several states of the union, and the respect and restraint which each owes to the others, and in the light of the fact that citizens of the several states are stockholders in corporations organized by, existing in and governed and regulated by other states, it is not fundamental that New York in obedience to the same principles, which this Court has formulated for the federal courts, should not have refrained from enjoining its own citizens from applying to Connecticut's courts, and, thus, have impinged on Connecticut's sovereign right to regulate and govern its own corporations.

The existence of an abstract New York declaratory judgment does not carry with it a right of New York to enforce it in Connecticut, nor does it dispense with New York's obligation to respect Connecticut's statutes, including Connecticut's right to regulate and govern its own corporations (*Armour Fertilizer Works* v. *Sanders*, 63 F. 2nd 902, 904 [C.C.A. 5]).

We have seen that Connecticut's General Corporation Law contemplates that its corporations may, by by-law, provide for their government; moreover, that the least that may be said is that the interpretation of Connecticut's statute and case law, if plain meaning be given to ordinary English words, permitted AFC and its stockholders to do precisely what the New York courts—harking back to an unrealistic speculation of Connecticut's common law, on the assumption that it *is* what New York's was, and what New York, itself, has now abandoned, and disregarding Connecticut's statutory law—have said AFC could not validly so accomplish.

This is clearly in violation of the command of the Constitution that "Full Faith and Credit shall be given in each State to the Public Act * * * of every other State."

Had this case come to this Court from the lower federal courts, this court—as the foregoing authorities show—would have remanded it, to ascertain from Connecticut what was and is its public policy.

It was New York's obligation to proceed in the same spirit—and not, by injunction, to prevent what this Court, within the federal competency, would not only have facilitated, but commanded.

In an era in which it is not at all uncommon for the citizens of a particular State to own stock, and to have control prerogatives in a corporation organized and existing in and governed by another State in which the corporation is domiciled, it is, indeed, a serious matter permanently to deprive the stockholders of a particular corporation, such as AFC, of all right to invoke, as to its internal government, the regulatory jurisdiction of the courts of its domiciliary State—and thus, as here, by the process of injunction, have the courts of the forum indefinitely supplant the courts of the domicile in enforcing as to that corporation—a pariah, as it were—the forum's conception of foreign domiciliary law—outmoded even within its own jurisdiction.

CONCLUSION

A writ of certiorari should issue to review the judgment of the Court of Appeals of the State of New York.

Dated: June 20, 1961.

Respectfully submitted,

JAY LEO ROTHSCHILD,
Attorney and Counsel for Petitioners.

APPENDIX TO PRECEDING BRIEF

[All Excerpts from Certified Record and from official Reports]

Opinion of Mr. Justice Gavagan at Special Term of the Supreme Court, New York County, in the Action Resulting in the Judgment Sought to Be Reviewed.

[GRANTING A TEMPORARY INJUNCTION]

(16 Misc. 2d 1022; 184 N.Y.S. 2d 911)

In an action for a permanent injunction, plaintiffs, a Connecticut corporation authorized to do business in New York and its majority stockholders, seek a temporary injunction to restrain the defendants, the minority stockholders, from prosecuting an action now pending in Connecticut on the ground that the Connecticut action is vexatious and involves the same issues adjudicated in a prior action in this state. For clarity, the three actions are hereinafter referred to as the prior action, the present action and the Connecticut action. The defendants who have been served herein cross move for summary judgment.

On this application the basic questions presented are whether the judgment in the prior action is res judicata of the Connecticut action and if so whether such a defense should be resolved here or in the courts of Connecticut.

The material facts are not in dispute. In 1953 the stockholders of the corporate plaintiff entered into an agreement which contained two voting provisions relevant to the instant motions: (1) the stockholders, in the election of directors, were required to vote for the four designees of the majority stockholders (the individual plaintiffs) and the three designees of the minority stockholders (the defendants); and (2) the bylaws of the corporation were to be amended so that no action could be taken by its board of seven directors except with the vote of approval of six of them. Those provisions went unchallenged until one of the minority shareholders, a director and general counsel of the corporation, allegedly sought a private profit

from a corporate transaction. When this became known to the majority shareholders, they indicated their unwillingness to continue the employment of the general counsel and to re-elect him as one of the directors designated by the minority. The prior action was then instituted by the minority group for a mandatory injunction to require the majority (the corporation was not a party) to comply with the voting provisions of the stockholders' agreement. The answer in the prior action alleged as a partial defense the validity of the voting provisions and the bylaw adopted pursuant thereto and asserted a counterclaim to declare the invalidity of such voting provisions and bylaw. During the course of the trial, and by stipulation for the purpose of the prior action only, the misconduct of the director and general counsel was admitted, and judgment was granted dismissing the complaint and sustaining the counterclaim. In essence, the judgment declared that the provisions of the stockholders' agreement which required concurrence of six of the seven directors was invalid under the laws of Connecticut and further declared that the corporate bylaws to the same effect were similarly invalid.

Upon appeal to the Appellate Division, the judgment was affirmed unanimously with respect to dismissal of the complaint, with one justice dissenting, as to the declaratory judgment on the counterclaim. The dissenting opinion (180 N.Y.S. 2d 400, 401-402) held that the judgment on the counterclaim "involved the exercise of visitorial powers over a foreign corporation and an interference with its internal affairs and management" and that the parties should have been relegated to the Connecticut courts to declare the Connecticut law on such questions, particularly where the foreign corporation was not a party to the action. A motion for reargument was denied and an appeal to the Court of Appeals from the judgment on the counterclaim is now pending.

Before the affirmance of the Appellate Division, the minority shareholders instituted the Connecticut action

against the corporation and one of its officers, as well as against the majority shareholders. In that action, the minority sought, in their own view, to obtain a declaration that under the Connecticut law and the corporate bylaws a quorum should consist of no less than six directors and that the corporation had violated a corporate resolution adopting the stockholders' agreement by permitting action by less than four directors.

The majority stockholders contend that the prior action is fundamentally the same as the Connecticut action. The majority, viewing the two actions together, see these substantial similarities: In the prior action the minority sought compliance with the stockholders' agreement with respect to the then impending election of directors; in the Connecticut action, the minority seek compliance with a corporate resolution adopting the same stockholders' agreement after the election has been held. In the prior action, the validity of the stockholders' agreement and the pertinent corporate bylaw was determined with respect to the discharge of the general counsel; in the Connecticut action, the validity of the same agreement, as adopted by corporate resolution, and of the same bylaw with respect to all action by the directors would arise again upon joinder of issue.

The classical statement of the rule of res judicata as found in Schuykill Fuel Corporation v. B. & C. Nieberg Realty Corp'n (250 N. Y. 304, 306-307) is apposite here: "A judgment in one action is conclusive in a later one, not only as to any matters actually litigated therein, but also as to any that might have been so litigated, when the two causes of action have such a measure of identity that a different judgment in the second would destroy or impair rights or interests established by the first." There can be no doubt that a decision unfavorable to the majority stockholders on any of the counts pleaded in the Connecticut action would dissolve or vitiate the

judgment and declaration of rights decreed by the New York court in the prior action.

The minority stockholders urge that, in view of the difference in parties, the judgment in the prior action cannot be conclusive upon the corporation which was not a party to that action. The Court of Appeals has held that where, as here, all the owners of a closed corporation have appeared and participated in a prior action they will not be permitted to use the corporate cloak as a means to avoid the finality of the earlier adjudication (In re Shea's Will, 309 N. Y. 605, 617).

Although the minority stockholders concede that the declaratory judgment in the prior action is final despite pendency of an appeal (Matter of Bailey, 265 App. Div. 758, aff'd 291 N. Y. 534; Sullivan v. Ringler & Co., 69 App. Div. 388, aff'd 171 N. Y. 694) they argue that whatever the decision of the Court of Appeals on the appeal now pending, Connecticut does not have to follow it. In Milliken v. Meyer (311 U. S. 457, 463), the Supreme Court decreed that where a state court had jurisdiction of the parties and the subject matter, as this court had in the prior action, "the full faith and credit clause of the Constitution precludes any inquiry [by the courts of a sister state] into the merits of the cause of action, the logic or consistency of the decision or the validity of the legal principle on which the judgment is based."

To permit the minority stockholders to escape the consequence of an unfavorable judgment after having invoked the jurisdiction of this court would, in my opinion, flout every precept of fairness, equity and justice (see Wehrhane v. Peyton, 134 Conn. 486).

Accordingly, except as to Bechtel who is neither party nor privy to the actions in this state, the motion for temporary injunction is granted pending the determination of the appeal by the Court of Appeals. The cross-motion is denied. Settle order.

Appendix.

Opinion of Mr. Justice Markowitz at Special Term of the Supreme Court, New York County, in the Action Resulting in the Judgment Sought to Be Reviewed.

[GRANTING SUMMARY JUDGMENT, AND A PERMANENT INJUNCTION]

(25 Misc. 2d 39, 195 N.Y.S. 2d 967)

Berger v. Mook—An action had been instituted in this court to which all of the stockholders of a Connecticut corporation authorized to do business here were parties. That action involved an underlying stockholders' agreement and the validity of two voting provisions therein contained and the bylaws adopted pursuant thereto. The action went to judgment declaring the provisions and bylaws invalid, and the judgment was affirmed by the Appellate Division and further by the Court of Appeals. Thereafter these defendants commenced a second action in the State of Connecticut bringing into issue the same agreement and provisions and bylaws. This action was then instituted for a permanent injunction restraining these defendants from prosecuting the pending action in the State of Connecticut as vexatious.

The facts are fully set forth in the opinion of Gavagan, J., granting to plaintiffs a temporary injunction (16 Misc. 2d 1022, aff'd 8 App. Div. 2d 793) and need not be further related except that three of the defendants have now instituted a further action in the State of Connecticut seeking a dissolution of the corporation. Of course no question of enjoinder of that action is here involved, although there is necessarily tendered by reason of an allegation in that complaint and in subsequent pleadings the question of the estoppel of the judgment entered in the prior action instituted and tried here. Plaintiffs now move for summary judgment. Defendants cross-move for an order vacating the order granting plaintiff's motion for temporary injunction and for judgment pursuant to Rule 113. Concededly, only questions of law are involved.

Temporary injunction could have been granted and the order could have been affirmed only upon a satisfactory showing that the prior action here and that suit first commenced in Connecticut were between the same parties and upon the same issues, that estoppel of judgment was sufficiently shown and the maintenance of the Connecticut action was vexatious. These conclusions emerge from the present submission.

Defendants assert that the issue is not which of the actions was prior in time and in which of two competing jurisdictions the parties should be permitted to litigate but rather which jurisdiction is the one that enjoys the prerogative and ability to give effective relief, to declare public policy applicable to a corporation owing its existence to one of them. This indeed was necessarily inherent in the prior action here. The courts of this state cannot be expected to exercise their discretion in the application of equitable principles in favor of the parties prosecuting the foreign action when the action in this jurisdiction was not only first commenced but has been tried upon the identical issues and judgment against the defendants (plaintiffs in the former action) has been affirmed by the highest court of this state. The vexation is compounded. The fact that no consequential relief was sought or granted in the prior action here is of no significance whatever, even though in the action in Connecticut the plaintiffs are there seeking specific relief with respect to the voting provisions of the underlying stockholders' agreement and the bylaws found by the judgment here to be invalid. Again defendants urge the issue in the Connecticut action is whether the New York judgment is entitled to conclusive effect in Connecticut as to the construction to be put upon it and the policy to be formulated with respect to Connecticut's own corporation laws. But in that action plaintiffs seek an entirely different result and again put in issue the agreement and bylaws, contending for their

validity, issues which have been here fully litigated. The effect of the New York judgment may be inquired into in the dissolution action, but to inquire again into the legal effect of the agreement and bylaws in the circumstances here is vexatious. It is suggested that a Connecticut corporation cannot operate contrary to Connecticut public policy, but this is to suggest that the courts of this state, in passing upon the questions raised here, were in some way incapable of doing so.

Finally, nothing transpiring since the institution of the dissolution action in Connecticut warrants consideration of defendants' demands for vacatur of the temporary injunction and summary judgment in their favor.

Plaintiffs' motion is granted, and defendants' motion is denied. Settle order.

New York Court of Appeals' Reporter's Memorandum of Affirmance of Injunction Judgment Sought to Be Reviewed.

[9 N. Y. 2d 805]

SAMUEL S. BERGER et al., Respondents, *v.* JOSEPH MOOK et al., Appellants.

Argued February 20, 1961; decided March 30, 1961.

Judgments—res judicata—judgment in action in New York determined that by-law of Connecticut corporation, adopted pursuant to agreement between majority and minority stockholders, was invalid—defeated stockholders then commenced action in Connecticut against successful stockholders for injunction to restrain them from violating agreement and from violating by-law—in present action by successful stockholders, Supreme Court enjoined maintenance of Connecticut action—judgment properly affirmed.

Berger v. *Mook*, 10 A D 2d 917, affirmed.

APPEAL, by permission of the Court of Appeals, from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department, entered May 18, 1960, unanimously affirming a judgment of the Supreme

Court in favor of plaintiffs, entered in New York County upon an order of the court at Special Term (JACOB MARKOWITZ, J.) which granted a motion by plaintiffs for summary judgment and directed the entry of a decree permanently enjoining defendants from prosecuting an action in the Superior Court of the State of Connecticut in and for Fairfield County. The action was commenced to enjoin the prosecution of said action on the ground that the issues had been tried and decided against defendants in the courts of New York. American Fabrics Company was a Connecticut corporation, authorized to transact business in New York. Individual plaintiffs, residents of New York, owned 50.22% of the stock and defendants, also residents of New York, owned 49.78% of the stock. On July 9, 1953 individual plaintiffs entered into an agreement with defendants whereby it was provided, among other things, that the by-laws of American Fabrics Company be amended so as to provide that the board of directors of the company should consist of seven members, and that no action by the board could be taken effectively except upon the affirmative *vote* of six of the company's directors. On the same day, the by-laws of American Fabrics Company were amended to include such provision. The by-laws also provided, both before and after their amendment as aforesaid: "A majority of the board of directors shall constitute a *quorum* at any regular or special meeting." (Emphasis supplied.) In an action commenced in March, 1958, the Supreme Court, New York County, declared the amendment of the by-laws invalid. The judgment was affirmed by the Appellate Division (7 A D 2d 726) and by the Court of Appeals (6 N Y 2d 833). While the appeal to the Appellate Division was pending, defendants instituted an action against plaintiffs and against American Fabrics Company in the Superior Court of the State of Connecticut in and for Fairfield County wherein they requested an injunction restraining plaintiffs herein from holding directors' meetings with a quorum of less

than six and restraining them from violating the July, 1953 agreement. On January 26, 1959 plaintiffs commenced this action to enjoin defendants from prosecuting the Connecticut action. In the Court of Appeals plaintiffs argued that the judgment in the first action, adverse to defendants, was *res judicata* of the issues sought to be litigated in the Connecticut action; that the parties were the same, although others were included; that the issues were the same; that the remedy of injunction was proper, not to enforce the New York judgment but to forestall its nullification by a vexatious suit brought in a foreign jurisdiction, and that the injunction violated none of defendants' constitutional rights. Defendants argued, among other things, that the amendment to the by-laws (invalidated in the first New York action) served not only to require a vote of six but also a quorum of six; that the invalidation of said amendment affected only the voting requirement of six but not the alleged quorum requirement of six, and that they therefore had a right to litigate the quorum issue in the Connection action.

Jay Leo Rothschild for appellants.

David I. Shivitz for respondents.

Judgments affirmed, with costs; no opinion.

Concur: Chief Judge DESMOND and Judges DYE, FULD, FROESSEL, VAN VOORHIS, BURKE and FOSTER.

Excerpts From Decision (Containing Findings) of Mr. Justice Backer at Special Term Relating to Entry of Declaratory Judgment on Respondents' Counterclaim in the Underlying Action.

Findings of Fact and Conclusions of Law

* * *

22. That neither in the aforesaid agreement dated July 9, 1953, nor in the Certificate of Incorporation or by-laws of

The American Fabrics Company, nor in the laws of the State of Connecticut, is there any provision requiring the vote of the holders of more than a majority of said corporation's outstanding stock in order to elect any one or more of the directors thereof at a meeting duly held for such purpose.

23. That neither at the time of the execution of the aforesaid agreement of July 9, 1953, nor at any time thereafter, was there any provision in the Certificate of Incorporation of The American Fabrics Company requiring a vote of more than a majority of a quorum of its directors in order that action be effectively taken by the Board of Directors, or authorizing or permitting the adoption of a by-law requiring a vote of more than a majority of a quorum of its directors in order that action be effectively taken by such Board.

24. That neither at the time of the execution of the aforesaid agreement of July 9, 1953, nor at any time thereafter, was there any statute or other provision in the laws of the State of Connecticut requiring a vote of more than a majority of a corporation's Board of Directors in order that action be effectively taken by such Board, or authorizing or permitting a corporation, by the adoption of a by-law or otherwise, to require a vote of more than a majority of a quorum of such corporation's Board of Directors in order that action be effectively taken by such Board.

25. That in the absence of any statute or other provision in the laws of the State of Connecticut as to the number of votes of directors required for effective action by a Board of Directors of a corporation, the common law of the State of Connecticut prevails; that the common law of the State of Connecticut is the same as that of the State of New York, as enunciated by the Court of Appeals of the State of New York in the case of *Benintendi* v. *Kenton Hotel, Inc.*, 294 N. Y. 112; and that under the common law

of both such States the vote of a majority of a quorum of a corporation's Board of Directors, duly convened, is sufficient for action to be effectively taken by such Board.

26. That under the laws of the State of Connecticut a provision in an agreement which requires the adoption of a by-law by a Connecticut corporation that no action may be effectively taken by its Board of Directors, consisting of seven members, except upon the affirmative vote of six of such directors, is invalid.

27. That under the laws of the State of Connecticut, a by-law of a Connecticut corporation which provides that no action may be effectively taken by its Board of Directors, consisting of seven members except upon the affirmative vote of six of the corporation's directors, is invalid.

28. That the aforesaid agreement of July 9, 1953, insofar as it provides, in paragraph "11" thereof, that the by-laws of The American Fabrics Company are to be amended so that no action by its Board of Directors may be effectively taken except upon the affirmative vote of six of the corporation's seven directors, is void and unenforceable under the laws of both the States of New York and Connecticut; and the aforesaid amended by-law, adopted pursuant to said agreement, providing that no action by the Board of Directors may be effectively taken except upon the affirmative vote of six of the corporation's seven directors, is wholly invalid and inoperative.

29. That in their complaint in this action, the plaintiffs have alleged that the stated intention of the defendants to discharge plaintiff Leonard Mook as general counsel for The American Fabrics Company is a breach of the terms of the aforesaid agreement dated July 9, 1953, and that the Board of Directors, by vote of the four directors of the company designated by the defendants, has no power or authority to discharge the plaintiff Leonard Mook as gen-

eral counsel for the company without the concurrence of at least two of the directors selected by the plaintiffs.

30. That by reason of the foregoing, a valid dispute has arisen and now exists between the plaintiffs, on the one hand, and the defendants, on the other hand, as to the validity and enforceability of the above-referred to provision of the July 9, 1953 agreement, as to the validity of the aforesaid by-law adopted pursuant to such provision of said agreement, and as to whether or not the Board of Directors of The American Fabrics Company, acting by a majority of a quorum at a meeting of such Board duly conv ned, has the power and authority to discharge the plaintiff Leonard Mook as general counsel for the company.

31. That the judgment of this Court adjudging and declaring the rights of the respective parties hereto is necessary so that the defendants, as the owners of a majority of the outstanding stock of The American Fabrics Company, and the directors designated by them constituting a majority of the said corporation's Board of Directors, will not be impeded in the exercise of their best judgment in the management of the affairs of the said corporation, particularly with respect to its choice of general counsel, and so that there may be certainty as to the right and power of the Board of Directors of The American Fabrics Company, acting by a majority of a quorum of such Board, to take effective action with respect to any question arising in the future.

32. That unless the issue as to the validity and enforceability of the aforesaid provision in the agreement of July 9, 1953, and the by-law adopted pursuant thereto are adjudicated in this action, irreparable harm will result in that third persons dealing with The American Fabrics Company will be unable to rely upon the power and authority of the company's Board of Directors, acting by a majority of a quorum, to bind the corporation.

33. That the defendants have no adequate remedy at law.

CONCLUSIONS OF LAW

• • • •

2. That the defendants are entitled to judgment in their counterclaim herein, adjudging, decreeing, and declaring (a) that the aforesaid agreement dated July 9, 1953, insofar as it provides in paragraph "11" thereof that the by-laws of The American Fabrics Company be amended so that no action by its Board of Directors may be effectively taken except upon the affirmative vote of six of the corporation's seven directors, is invalid, void, and unenforceable; and (b) that the amended by-law of said corporation adopted pursuant to said provision of said agreement insofar as it provides that no action by its Board of Directors may be effectively taken except upon the affirmative vote of six of the members thereof, is invalid, void, and inoperative.

• • • •

I do direct that judgment be entered in accordance herewith.

Dated: June 12, 1958.

FREDERICK BACKER
Justice of the Supreme Court

Appendix.

Excerpts From Judgment of Mr. Justice Backer at Special Term to the Extent That it Renders Declaratory Judgment on Respondents' Counterclaim in the Underlying Action.

At a Special and Trial Term of the Supreme Court of the State of New York, Part VI thereof, held in and for the County of New York at the County Courthouse Borough of Manhattan, in said County on the 16 day of June, 1958.

Present: Hon. FREDERICK BACKER, Justice.

4475/58

JOSEPH MOOK, MORRIS MOOK, LEONARD MOOK, SYLVIA MOOK, DAVID MOOK and DANIEL MOOK,

Plaintiffs,

against

SAMUEL S. BERGER, SADIE BERGER, HARRY MERDINGER, MILDRED MERDINGER, ARTHUR MERDINGER, HARVEY L. OSTROVER and LILA P. OSTROVER,

Defendants.

The issues in the above entitled action having been duly tried before Hon. Frederick Backer, one of the Justices of this Court, on the 28th day of May, 1958, at a Special and Trial Term, Part VI thereof, held in and for the County of New York, and the proofs and evidence of the parties having been submitted upon the issues raised, and the plaintiffs having appeared by Roy M. Cohn, Esq., their attorney, and the defendants having appeared by Halperin, Natanson, Shivitz, Scholer & Steingut (David I. Shivitz, Esq., of counsel), their attorneys, and the Court, after due deliberation, having made and filed a decision in writing, directing that judgment be entered as hereinafter set forth, it is, on motion of Halperin, Natanson, Shivitz, Scholer & Steingut, attorneys for the defendants,

ORDERED, ADJUDGED AND DECREED that plaintiffs' complaint herein be and the same hereby is dismissed; and it is further • • •

ORDERED, ADJUDGED AND DECLARED that the agreement dated July 9, 1953, entered into by and among plaintiffs, Joseph Mook, Morris Mook and Leonard Mook (referred to in said agreement collectively as the "Mook Group"); and defendants, Samuel S. Berger, Sadie Berger, Harvey L. Ostrover and Lila P. Ostrover (referred to in said agreement collectively as the "Berger Group"); and defendants, Harry Merdinger and Mildred Merdinger (referred to in said agreement collectively as the "Merdinger Group"), in so far as it provides in paragraph "11" thereof that the by-laws of The American Fabrics Company be amended so that no action by its Board of Directors may be effectively taken except upon the affirmative vote of 6 of the corporation's 7 directors, is invalid, void and unenforcible; and that the amended by-law of said corporation adopted pursuant to the provisions of said agreement in so far as it provides that no action by its Board of Directors may be effectively taken except upon the affirmative vote of 6 of the members thereof, is invalid, void and inoperative; • • •

Judgment signed this 16th day of June, 1958.

FREDERICK BACKER,
J. S. C.

JAMES MCGURRIN,
Clerk.

Filed June 17, 1958
New York
County Clerk's Office

• • •

Appendix.

Decision of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, Affirming Judgment Rendered by Mr. Justice Backer at Special Term, in the Underlying Declaratory Judgment Action, and Including the Dissenting Opinion of Mr. Justice Valente.

(7 A. D. 2d 726 [case 1]; 180 N. Y. S. 2d 400)

SUPREME COURT,

APPELLATE DIVISION—FIRST DEPARTMENT.

December 1958.

CHARLES D. BREITEL, J.P.,
FRANCIS L. VALENTE,
JAMES B. M. MCNALLY,
HAROLD A. STEVENS, JJ.

No. 1005

[TITLE]

Appeal from a judgment of the Supreme Court, New York County, entered June 17, 1958, after a trial before Backer, J., which dismissed the complaint and granted declaratory judgment in favor of the defendants on their counterclaim.

* * *

AFFIRM, ALL CONCUR EXCEPT VALENTE, J., WHO DISSENTS IN DISSENTING OPINION.

VALENTE, J. (dissenting):

I agree that plaintiffs' complaint was properly dismissed. No injunction should issue to require stockholders to continue in office a director or officer who—at least for the purpose of this case—admitted misfeasance and a breach of trust. That conclusion stands irrespective of the validity or illegality of the stockholders' agreement and the corporate by-law.

But I must dissent from the affirmance of that part of the judgment which grants declaratory judgment in favor of defendants on their counterclaim. Defendants sought a declaration that certain provisions in an agreement among stockholders of a Connecticut corporation, and the by-law adopted pursuant thereto, were void and inoperative. A declaratory judgment upon that question necessarily involved the exercise of visitorial powers over a foreign corporation and an interference with its internal affairs and management. Moreover, it entailed a construction of the law of Connecticut, not previously interpreted in any authoritative manner by the courts of that State, on the intricate problem of the effect of stockholders' agreements and by-laws which require unanimity or a high vote for shareholder or director action.

Before the amendment of our own statutes (Sec. 9, Stock Corporation Law) the Court of Appeals in *Benintendi* v. *Kenton Hotel,* 294 N. Y. 112, was divided 4 to 3 on the interpretation of New York law on that subject. With the Connecticut courts easily accessible to the parties, why should they not be relegated to those courts to declare the Connecticut law on the question? Under Rule 212, Rules of Civil Practice, Special Term should have declined to pronounce a declaratory judgment and should have dismissed the counterclaim. (*Langfelder* v. *Universal Laboratories,* 293 N. Y. 200, 204; *Cohn* v. *Mishkoff Costello Co.,* 256 N. Y. 102; *Travis* v. *Knox Terpezone Co.,* 215 N. Y. 259; *Harris* v. *Weiss Engineering Corp.,* 267 App. Div. 96; *Nothiger* v. *Corroon & Reynolds Corp.,* 266 App. Div. 299; *Bickart* v. *Kelly-Springfield Tire Co.,* 243 App. Div. 72; *Lakeman Realty Corp.* v. *Sunny Isles Co.,* 5 Misc. 2d 471; *Weiss* v. *Routh,* 149 F. 2d 193.)

Moreover, I think that declaratory judgment was improperly granted without the presence of the corporation as a party to the action.

I would therefore modify the judgment to the extent of dismissing the counterclaim and otherwise affirm.

Appendix.

New York Court of Appeals' Reporter's Memorandum of Affirmance of the Underlying Declaratory Judgment.

[6 N. Y. 2d 833]

JOSEPH MOOK et al., Appellants, *v.* SAMUEL S. BERGER et al., Respondents.

Argued April 6, 1959; decided May 28, 1959.

Corporation—foreign corporation—declaration of invalidity of by-law—stockholders of Connecticut corporation were residents of New York—stockholders entered into agreement that by-laws of corporation be amended to provide that board of directors could not act except upon vote of six of seven corporate directors—Special and Trial Term, in action between all stockholders of corporation, declared such provision in agreement and by-law invalid on finding that no statute of Connecticut governed, that common law controlled, that common law of New York and Connecticut were same and that under common law by-law was invalid—judgment properly affirmed.

Mook v. *Berger*, 7 A D 2d 726, affirmed.

APPEAL from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department, entered December 30, 1958, affirming, by a divided court, a judgment of the Supreme Court in favor of defendants, entered in New York County upon a decision of the court on a trial at Special and Trial Term (FREDERICK BACKER, J.), granting judgment to defendants on their counterclaim declaring that an agreement between the parties, insofar as it provided that a by-law of American Fabrics Company be amended to provide that no action by its board of directors could be taken except upon the affirmative vote of six of the corporation's seven directors, and the amended by-law adopted pursuant to such agreement were invalid. American Fabrics Company was a Connecticut corporation, authorized to transact business in New York. Plaintiffs, residents of New York, owned 49.78% of the stock of American Fabrics Company and defendants, also residents of New York, owned 50.22% of the stock. On July 9, 1953 plaintiffs Joseph Mook, Morris Mook and Leonard Mook and all defendants entered into an agreement whereby it was provided, among other things, that the by-laws of

American Fabrics Company be amended so as to provide that the board of directors of the company should consist of seven members, and that no action by the board could be taken effectively except upon the affirmative vote of six of the company's directors. On the same day, the by-laws of American Fabrics Company were amended to include such provision. Special and Trial Term made findings of fact that neither at the time of the execution of the agreement nor at any time thereafter was there any statute of Connecticut requiring a vote of more than a majority of a corporation's board of directors in order that action be effectively taken by such board; that, in the absence of any statute as to the number of votes of directors required for effective action, the common law of Connecticut prevailed; that the common law of Connecticut was the same as that of New York; that under the common law of both States the vote of a majority of a quorum of a corporation's board of directors, duly convened, was sufficient; that under the laws of Connecticut a provision in an agreement which required the adoption of such a by-law by a Connecticut corporation was invalid, and that the by-law was also invalid. In the Court of Appeals defendants argued that the corporation was neither a necessary nor indispensable party to the action since all the parties to the agreement were before the court and any position that the corporation could take was covered by the litigants; that jurisdiction was properly taken by the courts of this State since the declaratory judgment did not involve the exercise of visitorial powers upon a foreign corporation or interference in the corporation's internal affairs, and that the provision in the agreement and the by-law which carried it out were both invalid.

Jay Leo Rothschild for appellants.

David I. Shivitz for respondents.

Judgment affirmed, with costs; no opinion.

Concur: Chief Judge Conway and Judges Desmond, Dye, Fuld, Froessel, Van Voorhis and Burke.

Appendix.

Excerpts From: Corporation Laws, General Statutes of Connecticut.

Revision of 1949 as Amended (Revised 1956) and as Amended 1957.

[part of Exhibit A, offered, Buff 205, and handed up as a separate book]

"SEC. 2570d. GENERAL POWERS. Each corporation, in addition to all other powers specially granted to it by law, shall have power, subject to such provisions and limitations as may be contained in its charter or certificate of incorporation or in any statute affecting it: (1) To have succession by its corporate name for the time stated in its charter or certificate of incorporation and, when no period is limited, perpetually; (2) to sue and be sued and complain and defend in any court; (3) to make and use a common seal and alter the same at pleasure; (4) to hold, purchase, sell and convey such real and personal estate as the purposes of such corporation shall require, and all other property which shall have been in good faith mortgaged or conveyed to it by way of security or in satisfaction of debts or by purchase at sales upon judgments or decrees obtained for such debts; (5) to elect or appoint, in such manner as it may determine, all necessary or proper officers and agents, and to fix their compensation and define their powers and duties; (6) to make by-laws, consistent with law, fixing the number of its directors and for its government, the regulation of its affairs and the management of its property; (7) to wind up and dissolve itself, or to be wound up and dissolved, in the manner provided by law; (8) * * * to mortgage its real and personal estate, including its franchises, and issue promissory notes, bonds or other evidences of indebtedness; (9) to issue one or more classes of stock; (10) to make donations for the public welfare or for charitable, scientific or educational purposes."

"PUBLIC ACT 189, 1957. [§ 5165] DIRECTORS. The property and affairs of each corporation shall be managed by three or more directors. Such directors need not be stockholders and shall be chosen annually by the stockholders at such time and place as may be provided by the by-laws, and shall hold office for one year, or until the next annual meeting, and until others shall be chosen and shall have qualified in their stead; but the original or amended certificate of incorporation of any corporation heretofore organized under the general law or hereafter under this chapter may provide for the classification of directors, either as to their term of office, or as to their election by one or more classes of stockholders exclusively, or both, provided no directors shall be elected for a shorter term than one year nor for a longer term than five years, and the classification shall be such that the term of one or more classes shall expire each succeeding year. The directors or trustees of any corporation or the governing board of any corporation having no directors or trustees, may fill any vacancy in their number for the unexpired portion of the term or until such corporation shall fill such vacancy. A majority of the directors shall constitute a quorum for the transaction of business unless it is provided in a by-law adopted by a stockholders' meeting that more or less than a majority shall constitute a quorum. The board of directors of any corporation, by affirmative vote of a majority of the whole board, may appoint from the directors an executive committee and such other committees as it may deem judicious and, to such extent as shall be provided in the by-laws, may delegate to such committees any of the powers of the board of directors. At least once in each year the directors of each corporation shall make a complete and detailed report of the financial condition of the corporation to its stockholders, which report shall be filed with the treasurer of the corporation or, if there be no such officer, with the president, and be

subject to the inspection of the stockholders at all reasonable times. Such report shall contain a statement of the number of shares of stock and the amount of other securities issued by any other corporation and owned by the corporation making the report, with the name and location of such other corporation. Subject to the by-laws adopted by the stockholders, the directors of any corporation may make and alter by-laws. A record shall be made of all proceedings had at any meeting of the directors held without the sfate. Such record shall be certified by the presiding officer and the secretary or clerk of such meeting, and the same shall be entered upon the record of such corporation."

Excerpts From By-Laws of American Fabrics Company as Amended in 1953.

[Buff, 355, 378]

"ARTICLE 3.

* * * *

Directors.

Amendment adopted at meeting of stockholders, July 9, 1953:

'That the board of directors of the company shall consist of seven members, and that no action by the board may be effectively taken except upon the affirmative vote of six of the company's members.'

Section 1. Election. At the annual meeting of the stockholders, six directors shall be elected to hold office until the next annual meeting of the stockholders or until their successor shall be elected and shall qualify, who shall constitute a governing board to manage and control the stock, property and affairs of the corporation.

* * * *

Section 4. Meetings.

* * * *

(c) Quorum. A majority of the Board of Directors shall constitute a quorum at any regular or special meeting.

• • • •"

"Amendment adopted at meeting of stockholders, July 9, 1953:

ARTICLE 8.

These By-laws may be repealed, amended or altered at any annual meeting or special meeting of the stockholders, provided that notice of intention to repeal, amend or alter the By-laws shall be given in the notice of said meeting."

[Both of the foregoing amendments, it will be recalled, were accomplished in a single paragraph, as reflected in the stockholders' minutes of July 9, 1953 (quoted, *supra*, p. ; stockholders' resolution (Gray, 266).]

Excerpts From Answer in the Action for Permanent Injunction, Here Sought to Be Reviewed.

ANSWER.

SUPREME COURT OF THE STATE OF NEW YORK,

NEW YORK COUNTY.

[SAME TITLE]

Defendants, Joseph Mook, Morris Mook and Leonard Mook, by their attorney, Jay Leo Rothschild, answer the complaint herein as follows:

• • • • • •

AS A FIRST COMPLETE DEFENSE

16. The New York judgment insofar as it granted the individual plaintiffs herein judgment on their counterclaim

violates Section 1 of Article IV of the Constitution of the United States, which provides as follows:

> "Full Faith and Credit shall be given in each State *to the public Acts,* Records and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

in that it failed to honor and to give full faith and credit to the Corporation Laws of the State of Connecticut, including that part of § 5165 of the Connecticut General Corporation Laws (as amended in 1957) which reads as follows:

> "A majority of the directors shall constitute a quorum for the transaction of business unless it is provided in a by-law adopted by a stockholders' meeting that more or less than a majority shall constitute a quorum."

17. By reason thereof, it lies within the discretion of the Connecticut Courts to determine as to whether they will be persuaded in their own deliberations to reach the same conclusion as did the New York Supreme Court, or otherwise; and, accordingly, no injunction against the prosecution of such Connecticut action should be issued.

18. Under the foregoing circumstances, the issuance of any restraint against defendants herein, would violate Article V and Article XIV (Section 1) of the Amendments to the Constitution of the United States, in that it would deprive defendants of the equal protection of the laws, and of their property without due process of law.

AS A SECOND COMPLETE DEFENSE

19. Repeats each and every allegation contained in Paragraph 16, hereof.

20. The New York judgment described in the complaint, insofar as it granted the individual plaintiffs herein judgment on their counterclaim, is not entitled to full faith and credit in the State of Connecticut or by its courts, because

it purports, without any necessity or justification therefor, to declare what shall be the public policy of the State of Connecticut, and, in doing so, fails to enforce, honor, or give full faith and credit to Connecticut's public acts and statutory law, which plainly and unmistakably authorize a quorum of a Board of Directors of a corporation chartered by Connecticut, of "more or less" "than a majority", and authorize any such corporation to adopt by-laws requiring a vote of said quorum greater than a majority of said quorum.

• • • • • •

WHEREFORE, the defendants, Joseph Mook, Morris Mook and Leonard Mook demand judgment dismissing the complaint together with the costs and disbursements of this action.

JAY LEO ROTHSCHILD,
Attorney for Defendants,
Joseph Mook, Morris Mook and Leonard Mook.

(Verified February 2, 1959.)

Excerpts From Pleas in Abatement of the Respondents Herein in the Enjoined Connecticut Action.

SUPERIOR COURT

FAIRFIELD COUNTY

JANUARY 5, 1959

JANUARY, 1959

JOSEPH MOOK, ET ALS.

vs.

THE AMERICAN FABRICS COMPANY, ET ALS.

PLEAS IN ABATEMENT

• • • •

SECOND PLEA IN ABATEMENT:

All the individual Defendants plead in abatement because:

1. Prior to the commencement of this action there was pending in the Supreme Court of the State of New York, an action brought by Joseph Mook, Morris Mook, Leonard Mook, Sylvia Mook, David Mook and Daniel Mook (Plaintiffs) against Samuel S. Berger, Sadie Berger, Harry Merdinger, Mildred Merdinger, Arthur Merdinger, Harvey L. Ostrover, and Lila P. Ostrover (Defendants) in which action a substantially similar cause of action involving the same issues was set forth as in the instant case.

2. On the 16th day of June, 1958, the Honorable Frederick Backer, a Justice of the Supreme Court of the State of New York, found the issues for the Defendants in said action.

3. Thereafter, the said Joseph Mook, et als., appealed to the Appellate Division of the Supreme Court of the State of New York, which Division, on December 19, 1958, entered a judgment of affirmance, and the appeal time to the Court of Appeals has not as yet expired.

4. The legal issues between the parties herein have been fully adjudicated and said issues are now res adjudicata.

WHEREFORE, the individual Defendants pray judgment.

• • • •

THE DEFENDANTS, AMERICAN FABRICS COMPANY, ET ALS.

By Friedman & Friedman
Their Attorneys

• • • •

Dated at Bridgeport, Connecticut, on January 5th, 1959.

FRIEDMAN & FRIEDMAN

By Arthur Levy, Jr.

Appendix.

Excerpts From Complaint of the Petitioners in the Connecticut Dissolution Action.

TO THE SHERIFFS OF THE COUNTIES OF FAIRFIELD AND HARTFORD OR THEIR DEPUTIES, GREETING:

BY AUTHORITY OF THE STATE OF CONNECTICUT, You are hereby commanded to summon THE AMERICAN FABRICS COMPANY, a corporation organized and existing under the laws of the State of Connecticut, and with its principal place of business in the City of Bridgeport, County of Fairfield in said State: SAMUEL S. BERGER, SADIE BERGER, HARVEY L. OSTROVER, LILA P. OSTROVER, HARRY MERDINGER, MILDRED MERDINGER, DAVID MOOK, DANIEL MOOK and SYLVIA MOOK, of the City, County and State of New York, and NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY, a corporation organized and existing under the laws of the Commonwealth of Massachusetts, and with its principal place of business at 501 Boylston Street, Boston, Massachusetts, and them summon to appear before the Superior Court within and for the County of Fairfield, to be held at Stamford, on the first Tuesday of September, 1959, and then and there to answer unto MORRIS MOOK, JOSEPH MOOK and LEONARD MOOK of the City, County and State of New York, in a civil action wherein the plaintiffs complain and say:

* * * *

40. By reason of said New York declaratory judgment, and said New York injunction, and the other acts as aforesaid, and as a consequence thereof, the Berger and Merdinger groups and AFC, in breach of their respective contractual obligations as aforesaid, and notwithstanding the provision in AFC's by-laws that there be no amendment of its by-laws except on consent of 80% of AFC's stockholders, by thus enforcing said declaratory judgment and by enjoining the Mook group from seeking a determination by Connecticut's courts, actually accomplished an amendment of AFC's by-laws, and did so by the act of the

said Berger and Merdinger groups alone, i.e., by the act of only 50.22% of AFC's stockholders, and thus, did in fact eliminate the provision which required a quorum of at least six; and an affirmative vote of six of AFC's seven directors for any effective action; and AFC committed a breach of its own by-laws contract with its stockholders.

41. Accordingly, the very basis upon which plaintiffs and each of them from time to time acquired their stock in AFC, and upon which plaintiffs Morris Mook and Joseph Mook made and continued loans to AFC, and subordinated the same to its creditors, including New England—all pursuant to and in reliance upon said 1948 stockholders' agreement and that of July 9, 1953, and upon the said by-laws of AFC and upon the representations made to plaintiffs as aforesaid has been undermined, subverted and frustrated, with the consequence that the purposes of the said agreements and of AFC's by-laws, and the government, organization, function and management of AFC have been diverted and that there has resulted a complete failure of consideration.

42. As a consequence, the Berger and Merdinger groups with the knowledge, approval and cooperation of AFC have usurped all the rights and privileges and property of the Mook group, and AFC has repudiated its obligations in violation of its agreement and of its by-laws.

• • • •

2. A decree dissolving defendant AFC.

• • • •

Dated at Stamford, Connecticut, this 17th day of August, 1959.

• • • •

Please enter our appearance for the plaintiffs in the above entitled action.

CUMMINGS & LOCKWOOD

Appendix.

Excerpts From Answer of the Respondents in the Connecticut Dissolution Action.

MORRIS MOOK, JOSEPH MOOK AND LEONARD MOOK	)	SUPERIOR COURT
VS.	)	FAIRFIELD COUNTY
THE AMERICAN FABRICS COMPANY ET AL	)	SEPTEMBER 28, 1959

ANSWER AND SPECIAL DEFENSES OF THE DEFENDANTS, THE AMERICAN FABRICS COMPANY, SAMUEL S. BERGER, SADIE BERGER, HARVEY L. OSTROVER, LILA P. OSTROVER, HARRY MERDINGER, AND MILDRED MERDINGER

BY WAY OF ANSWER:

* * * *

BY WAY OF SPECIAL DEFENSES:

1. That to the extent plaintiffs seek to sustain their cause of action by relying upon the validity of the amendment made to AFC's by-laws requiring the affirmative vote of six of its seven directors for effective Board action and upon the provision in the agreement of July 9, 1953 (Exhibit III) calling for such amendment to its by-laws, the plaintiffs herein are estopped from litigating that issue, such issue having already been fully litigated in an action heretofore brought by said plaintiffs and the other members of the Mook group of stockholders in the Supreme Court of the State of New York, New York County, in which action, after trial on the merits and upon appeal to the highest Court of the State of New York, it has been finally adjudicated that said amendment to such by-law and the said provision of the agreement of July 9, 1953 are invalid and void under the laws of the State of Connecticut.

2. That to the extent plaintiffs seek to sustain their cause of action by relying upon the validity of the amendment made to AFC's by-laws requiring the affirmative

vote of six of its seven directors for effective Board action and upon the provision in the agreement of July 9, 1953 (Exhibit III) calling for such amendment to its by-laws, the plaintiffs herein are prevented from litigating that issue under the principles of res adjudicata, such issue having already been fully litigated in an action heretofore brought by said plaintiffs and the other members of the Mook group of stockholders in the Supreme Court of the State of New York, New York County, in which action after trial on the merits and upon appeal to the highest Court of the State of New York, it has been finally adjudicated that said amendment to such by-law and the said provision of the agreement of July 9, 1953, are invalid and void under the laws of the State of Connecticut.

• • • •

THE DEFENDANTS,

• • • •

BY GOLDSTEIN AND PECK
Their Attorneys

Appendix.

Motion of Respondents in the New York Court of Appeals, Praying That Court to Supplement Its Judgment—Which Motion Was Denied.

[Note particularly, on the constitutional issues, pp. 86-7, *infra.*]

COURT OF APPEALS

STATE OF NEW YORK

SAMUEL S. BERGER, SADIE BERGER, HARRY MERDINGER, MILDRED MERDINGER, ARTHUR MERDINGER, HARVEY L. OSTROVER, LILA P. OSTROVER and THE AMERICAN FABRICS COMPANY,

Plaintiffs-Respondents,

against

JOSEPH MOOK, LEONARD MOOK, SYLVIA MOOK, DAVID MOOK, DANIEL MOOK and JOSEPH MOOK and LEONARD MOOK as Executors of the Estate of Morris Mook Deceased,

Defendants-Appellants.

SIR:

PLEASE TAKE NOTICE, that upon the annexed affidavit of David I. Shivitz, verified May 26, 1961, the record and proceedings heretofore had in the appeal taken to this Court in the above-entitled action, and upon the decision of this Court, dated March 30, 1961, unanimously affirming, without opinion, the judgment of the Appellate Division, First Department, the undersigned will move this Court, at a term for motions thereof, to be held at the Courthouse, in Court of Appeals Hall, Albany, New York, on the 5th day of June, 1961, at the opening of court on that day, or as soon thereafter as counsel may be heard, for the issuance by this Court of a supplemental determination, in

clarification of its decision, to the effect that, in reaching its decision, this Court fully considered, and rejected, appellants' contentions (1) that the by-law amendment declared invalid by the New York Supreme Court in the underlying action because it required a vote of six of the plaintiff-corporation's seven directors, nevertheless had the effect of validly amending such by-laws so as to require a quorum of six of the corporation's seven directors; and (2) that this issue with respect to the corporation's quorum requirements was not considered or passed upon by the New York courts in the underlying action; and for such other and further relief as to this Court may seem just and appropriate.

Dated: New York, N. Y., May 26, 1961.

Yours, etc.,

HALPERIN NATANSON SHIVITZ SCHOLER & STEINGUT,
Attorneys for Plaintiffs-Respondents,
Office & P. O. Address,
271 Madison Avenue,
New York 16, N. Y.

To:

JAY LEO ROTHSCHILD, Esq.,
Attorney for Defendants-Appellants,
Office & P. O. Address,
10 East 40th Street,
New York 16, N. Y.

Appendix.

Affidavit of David I. Shivitz.

[in Support of the foregoing motion]

COURT OF APPEALS

STATE OF NEW YORK

SAMUEL S. BERGER, SADIE BERGER, HARRY MERDINGER, MILDRED MERDINGER, ARTHUR MERDINGER, HARVEY L. OSTROVER, LILA P. OSTROVER and THE AMERICAN FABRICS COMPANY,

Plaintiffs-Respondents,

against

JOSEPH MOOK, LEONARD MOOK, SYLVIA MOOK, DAVID MOOK, DANIEL MOOK and JOSEPH MOOK and LEONARD MOOK as Executors of the Estate of Morris Mook, Deceased,

Defendants-Appellants.

DAVID I. SHIVITZ, being duly sworn, says:

I am a member of the firm of Halperin Natanson Shivitz Scholer & Steingut, attorneys for plaintiffs-respondents in the above-entitled action, and am fully familiar with all of the facts in this case. This affidavit is submitted in support of the within motion requesting this Court to issue a supplemental determination in clarification of its decision herein, in which it unanimously affirmed the judgment of the Appellate Division, First Department, but without opinion.

This action was for an injunction restraining defendants from further prosecuting an action which they had instituted in Connecticut, by reason of the similarity of issues there presented with those previously litigated in the courts of New York. As appears from the record submitted on

this appeal, a second Connecticut action, separate and distinct from the enjoined Connecticut action, was subsequently instituted by some of the defendants herein in which, *inter alia,* relief is sought dissolving the American Fabrics Company, a Connecticut corporation and the one involved in this litigation. One of the grounds for dissolution alleged by the plaintiffs in that action was that the plaintiffs herein have been successful in enjoining the defendants herein from proceeding with the first Connecticut action instituted by them.

This second Connecticut action has been set down for trial at Stamford, Connecticut, on June 20, 1961. On the basis of certain statements made by the attorneys for the plaintiffs in the dissolution action, I firmly believe that, in the course of the trial of that action, questions will arise as to what particular issues were considered and passed upon by the courts of New York, in the within action. Thus, I am advised that at a pretrial hearing before the Connecticut court, counsel for the plaintiffs in the dissolution action indicated that the Connecticut courts will have to determine the scope and effect of the judgment of the New York courts, particularly with respect to the effect that the invalidated bylaw may have had on the quorum requirements for action by the Board of Directors of the American Fabrics Company, and whether or not this particular issue was considered and passed upon by the New York courts.

The appellants herein, in their briefs to this Court, have contended that this so-called "quorum issue" had never been considered by the New York courts in the underlying action, Mook v. Berger (7 App. Div. 2d 726, aff'd 6 N. Y. 2d 833). Respondents contended to the contrary. This particular issue was also the subject of considerable discussion on the argument before this Court, by both counsel. On the basis of the briefs submitted by the parties to this action and the arguments made before this Court, I am

almost certain that the appellants' contentions as to the "quorum issue" have been thoroughly considered and rejected by this Court. If that is so, I respectfully submit that, in the interests of justice, the Connecticut court in the dissolution action should have the benefit of this Court's declaration to that effect.

WHEREFORE, it is respectfully prayed that this Court issue a supplemental determination in clarification of its decision in the above-entitled action, setting forth the issues considered and passed upon by it in reaching its decision, or that this Court grant such other and further relief as to it may seem just and appropriate.

/s/ DAVID I. SHIVITZ.

Sworn to before me this
26th day of May, 1961.

JEAN MANISCALCO,
Notary Public,
State of New York.
No. 24-7696950.
Qualified in Kings County.
Certificate filed in New York Co.
Commission Expires March 30, 1962.

Appendix.

Affidavit of Jay Leo Rothschild.

[in Response to the foregoing motion]

COURT OF APPEALS

STATE OF NEW YORK

SAMUEL S. BERGER, SADIE BERGER, HARRY MERDINGER, MILDRED MERDINGER, ARTHUR MERDINGER, HARVEY L. OSTROVER, LILA P. OSTROVER and THE AMERICAN FABRICS COMPANY,

Plaintiffs-Respondents,

against

JOSEPH MOOK, LEONARD MOOK, SYLVIA MOOK, DAVID MOOK, DANIEL MOOK and JOSEPH MOOK and LEONARD MOOK as Executors of the Estate of Morris Mook, Deceased,

Defendants-Appellants.

STATE AND COUNTY OF NEW YORK ss.:

JAY LEO ROTHSCHILD, being duly sworn, deposes and says:

I am attorney and counsel for the Appellants herein, and submit this affidavit with reference to the motion made by the successful Respondents herein—returnable in this Court on June 5, 1961—for what the Respondents characterize as the "issuance by this Court of a supplemental determination, in clarification of its decision", but which, more realistically appraised, amounts to a request for an opinion, in a case which this Court, in the exercise of its discretion, decided should be affirmed without opinion, and which was so determined.

The reason given by the successful Respondents for their most unusual request, is that, in the Connecticut dissolution action which is now pending—which Respondents say is set for trial for June 20th—it is and will be argued by the Appellants (plaintiffs therein) that the issue as to

the quorum requirements of the corporation involved (i.e., The American Fabrics Company) had not been decided by the New York courts, whereas the successful Respondents (defendants in said Connecticut dissolution action) are "almost certain" otherwise.

I was present in the Connecticut court-room, and heard whatever representations were made. The fact is that said Connecticut dissolution action is not set for trial for June 20th, but is now on trial, and continued until June 20th; moreover, that what was said on the subject of the quorum aspects of said Connecticut corporation's by-laws, by Mr. Ames of the firm of Cummings & Lockwood (Connecticut counsel there for Appellants herein), was incidental to the basic question as to whether the issues presented were not for Connecticut to decide for itself—with whatever persuasive effect it cared to give to the New York decisions in the underlying actions.

Accordingly, the successful Respondents herein in effect ask this Court to issue an advisory opinion to the Connecticut court, so that said Connecticut court may be, if not controlled, at least guided thereby, as to that which the successful Respondents herein confess they are only "almost certain." But the judgment of this Court, predicated on the record before it, speaks for itself, as it may be interpreted by traditional standards. The very issue which was before this Court, on the appeal herein, was whether the determination made by the courts below, and affirmed by this Court, and resulting in the restraint of Appellants' Connecticut Superior Court action (which, it will be recalled, is a different action from the Connecticut dissolution action to which reference is made herein and in Respondents' moving papers), should be permitted to stand, or rather should be resolved so that Appellants herein might apply to the Connecticut courts to decide what Appellants argued was within the Connecticut courts' exclusive prerogative. It will be recalled that it was Appellants' principal contention that, by reason of

Constitutional prohibitions (i.e., the full faith and credit clause [Section I of Article IV of the Constitution]; the equal protection of the laws clause [Section I of Article XIV of the Constitution], and the due process of law clause [Article V of the Amendments to the Constitution], set forth and pleaded in the defenses contained in the answer herein of Appellants—see, also, pp. 55 to 69 of our Main Brief to this Court), this Court, notwithstanding that it had approved a declaration of the rights of the parties in the underlying action, should not and could not undertake to *enforce* that declaration by the issuance of an injunction against the prosecution of any action in Connecticut, which would permit the Connecticut courts to determine the question for themselves.

This was and is the basic question. All else was incidental.

This Court could not have affirmed, without deciding that basic question against the Appellants herein.

Accordingly, it is respectfully submitted that, if this Court should be inclined to comply with the request of the successful Respondents, it should do so only after full reargument of the Constitutional questions which were necessarily and squarely decided against the Appellants herein.

JAY LEO ROTHSCHILD.

Sworn to before me this
2nd day of June, 1961.

ROSALIE HARRISS ROSS,
Notary Public,
State of New York.
No. 31-8667900.
Qualified in New York County.
Commission expires March 30, 1962.

Appendix.

Remittitur and Judgment of the New York Court of Appeals Sought to Be Reviewed.

No. 387

COURT OF APPEALS

State of New York, ss.:

PLEAS in the Court of Appeals held at Court of Appeals Hall, in the City of Albany, on the 30th day of March in the year of our Lord one thousand nine hundred and sixty-one, before the Judges of said Court

WITNESS,

The HON. CHARLES S. DESMOND,
Chief Judge, Presiding.

RAYMOND J. CANNON, Clerk.

Remittitur March 30, 1961

No. 49

SAMUEL S. BERGER, & ORS.,

Respondents,

vs.

JOSEPH MOOK, & ORS.,

Appellants.

BE IT REMEMBERED, That on the 12th day of November in the year of our Lord one thousand nine hundred and sixty, Joseph Mook, & ors., &c., the appellants in this cause, came here unto the Court of Appeals, by Jay Leo Rothschild, their attorney, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the First Judicial Department. And Samuel S. Berger, & ors., the respondents in said cause, afterwards appeared in said Court of Appeals by Halperin, Natanson, Shivitz, Scholer & Steingut, their attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Jay Leo Rothschild, of counsel

for the appellants, and by Mr. David I. Shivitz, of counsel for the respondents, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, with costs,

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

THEREFORE, it is considered that the said judgment be affirmed, with costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

/s/ RAYMOND J. CANNON,
Clerk of the Court of Appeals
of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,

Albany, March 30, 1961.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

/s/ RAYMOND J. CANNON,
Clerk.

SEAL OF THE
COURT OF APPEALS
OF THE STATE OF
NEW YORK